Supreme Court, U.S.

93 2 0 0 5 JUN 1 3 1994

OFFICE OF THE CLERK

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

JO ANN PLAKAS, Individually and as Administrator of the Estate of KONSTANTINO N. PLAKAS, Deceased,

Petitioner,

v.

JEFFREY DRINSKI, in both his individual and official capacity, and NEWTON COUNTY, INDIANA, a municipal unit of government,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

THOMAS E. MCCLURE
Counsel of Record
ROGER C. ELLIOTT
PAUL F. MICHEL
ELLIOTT & McCLURE, P.C.
18 Briarcliff Professional Center
Bourbonnais, Illinois 60914
(815) 935-1117

Attorneys for Petitioner

Midwest Law Printing Co., Chicago 60611, (312) 321-0220

73 pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether the alternative nonlethal means of arresting a suspect that are available to a police officer at the time that deadly force is used to effect a seizure must be considered when determining whether the seizure violated the suspect's fourth amendment rights.

2. Whether the totality of the circumstances, including the provocation of the suspect and other circumstances preceding the use of deadly force, must be considered when determining whether the seizure violated the suspect's fourth and fourteenth amendment rights.

3. Whether a municipality violates a citizen's fourth amendment rights where the municipality fails to adequately train its police officers in the areas of the use of deadly force, pursuit and dealing with a mentally disturbed or intoxicated suspect, and as a result, deadly force is used by a police officer.

4. Whether a municipality violates a citizen's fourth and fourteenth amendment rights where the municipality fails to equip its police officers with alternative nonlethal means of effecting an arrest, and as a result, deadly force is used by a police officer.

STATEMENT OF PARTIES TO THE PROCEEDING

The Petitioner is Jo Ann Plakas, who brought this action in her individual capacity and, as administrator of the estate of Konstantino N. Plakas, deceased. She was the Plaintiff-Appellant in the case before the United States Court of Appeals.

The Respondents are Jeffrey Drinski, in both his individual and official capacity and Newton County, Indiana, a municipal unit of government. Newton County, Indiana has no parent companies or subsidiaries. Jeffrey Drinski and Newton County, Indiana, were the Defendants-Appellees in the United States Court of Appeals.

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED FOR REVIEW	i
STATEMENT OF PARTIES TO THE PROCEEDING	ii
TABLE OF AUTHORITIES	v
REPORT OF OPINIONS	1
JURISDICTIONAL STATEMENT	1
CONSTITUTIONAL PROVISIONS AND STATUTES AT ISSUE	1
STATEMENT OF THE CASE	2
STATEMENT OF FACTS	2
ARGUMENT	
I.	
THE SHOOTING OF PLAKAS BY A POLICE OFFICER WAS UNREASONABLE UNDER THE TOTALITY OF THE CIRCUMSTANCES	11
A. The Shooting Of A Citizen By A Police Officer Is Unreasonable Under The Fourth Amendment Where The Police Officer Fails To Use Alternative Nonlethal Means To Effect The Arrest	12
B. The Shooting Of A Citizen By A Police Officer Violates The Fourth And Fourteenth Amendments Where The Unreasonable Conduct Of Police Officers At Any Time During The Pursuit Of A Suspect Creates The Justification For The Use Of Deadly Force .	16

II.

THE MUNICIPALITY VIOLATED THE CITIZEN'S RIGHT NOT TO BE SUBJECTED TO AN UNREASONABLE SEIZURE BY IMPROPERLY TRAINING AND EQUIPPING ITS POLICE OFFICERS 23

A. The Municipality Acted In Conscious Disregard Of The Citizen's Right Not To Be Subjected To An Unreasonable Seizure By Failing To Train Its Police Officers 24

B. The Municipality Acted In Conscious Disregard Of The Citizen's Right Not To Be Subjected To An Unreasonable Seizure And Right To Due Process Of Law By Failing To Equip Its Police Officers With Nonlethal Weapons 27

CONCLUSION 30

APPENDIX

PAGE

A—*Plakas v. Drinski*, 19 F.3d 1143 (7th Cir. 1994) (Docket No. 93-1431) A-1

B—*Plakas v. Drinski*, 811 F.Supp. 1356 (N.D. IN. 1993) (Civil No. H91-365) B-1

C—Constitutional Provisions and Statutes at Issue C-1

TABLE OF AUTHORITIES

Cases	PAGE
Brower v. County of Inyo, 489 U.S. 593 (1989), *appeal after remand*, 884 F.2d 1316 (9th Cir. 1989)	13, 14, 19, 20
City of Canton v. Harris, 489 U.S. 378 (1989)	23, 24, 27
Davis v. Mason County Washington, 927 F.2d 1473 (9th Cir. 1991), *cert. denied*, 112 S. Ct. 275 (1991)	24
Donovan v. City of Milwaukee, 17 F.3d 944 (7th Cir. 1994)	20
Erwin v. County of Manitowac, 872 F.2d 1292 (7th Cir. 1989)	24
Frye v. Town of Akron, 759 F. Supp. 1320 (N.D. IN. 1991)	24
Gilmer v. City of Atlanta, 774 F.2d 1495 (11th Cir. 1985), *cert. denied*, 476 U.S. 1115 (1986)	19
Graham v. Connor, 490 U.S. 386 (1989)	12, 16
Illinois v. Lafayette, 462 U.S. 640 (1983)	15
Kerr v. City of West Palm Beach, 875 F.2d 1546 (11th Cir. 1989)	24
Klein v. Ryan, 847 F.2d 368 (7th Cir. 1988)	13
Monell v. Dept. of Social Services, 436 U.S. 658 (1978)	28
Parker v. District of Columbia, 850 F.2d 708 (D.C. Cir. 1988), *cert. denied*, 489 U.S. 1065 (1989)	24
Russo v. City of Cincinnati, 953 F.2d 1036 (6th Cir. 1992)	24, 25
Salas v. Carpenter, 980 F.2d 299 (5th Cir. 1992)	28, 29

Starks v. Enyart, 5 F.3d 230 (7th Cir. 1993) 20

Tennessee v. Garner, 471 U.S. 1 (1985) 12, 13, 14, 15, 16, 19, 20

Tom v. Voida, 963 F.2d 952 (7th Cir. 1992) ... 12, 13, 14, 17

United States v. Sharpe, 470 U.S. 675 (1985) 15

Wierstak v. Heffernan, 789 F.2d 968 (1st Cir. 1986) 24

Other Authorities

U.S. Const. amend. IV 1

U.S. Const. amend. XIV 1

42 U.S.C. §1983 (1991) 1

Note, *Police Liability for Creating the Need to Use Deadly Force in Self-Defense*, 86 MICH. L. REV. 1982 (1988) 21

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

JO ANN PLAKAS, Individually and as Administrator of the Estate of KONSTANTINO N. PLAKAS, Deceased,

Petitioner,

v.

JEFFREY DRINSKI, in both his individual and official capacity, and NEWTON COUNTY, INDIANA, a municipal unit of government,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

REPORT OF OPINIONS

In *Plakas v. Drinski*, 811 F.Supp. 1356 (N.D. IN. 1993) (Civil No. H91-365), the Honorable Rudy Lozano entered summary judgment in favor of the defendants. The United States Court of Appeals for the Seventh Circuit affirmed in *Plakas v. Drinski*, 19 F.3d 1143 (7th Cir. 1994) (Docket No. 93-1431).

JURISDICTIONAL STATEMENT

1. The District Court for the Northern District of Indiana entered a final decision on January 15, 1993, granting summary judgment in favor of the defendants.

2. The original jurisdiction of the United States District Court for the Northern District of Indiana was invoked pursuant to 28 U.S.C. §1343(3). This action arises under the following federal laws: the Civil Rights Act, 42 U.S.C. §1983 and the fourth and fourteenth amendments to the United States Constitution.

3. On March 21, 1994, the United States Court of Appeals for the Seventh Circuit affirmed the decision of the District Court. No petition for rehearing has been filed.

4. No extension of time in which to file this petition for writ of certiorari has been granted.

5. The Supreme Court of the United States has jurisdiction to review the decision of the United States Court of Appeals pursuant to 28 U.S.C. §1254(1) (1988).

CONSTITUTIONAL PROVISIONS AND STATUTES AT ISSUE

U.S. Const. amend. IV; U.S. Const. amend. XIV, sec. 1; and 42 U.S.C. §1983 (1991) are set forth in Appendix C.

STATEMENT OF THE CASE

This is an action for the wrongful death of the plaintiff's decedent, Konstantino N. Plakas, that resulted from the shooting of the plaintiff's decedent by defendant, Jeffrey Drinski, while trying to effect his arrest. On October 15, 1991, the plaintiff filed suit in the Northern District of Indiana, Hammond Division, against Jeffrey Drinski in his official and individual capacity, and against the Newton County Sheriff's Department, pursuant to 42 U.S.C. §1983. (Record of Proceedings, page 1; hereinafter referred to as "R. 1"). The plaintiff later substituted defendant Newton County, a municipal unit of government, for defendant, Newton County Sheriff's Department. (R. 7).

On August 25, 1992, the defendant moved for summary judgment under Count I of the Complaint on the issue of the defendant Drinski's liability. (R. 19). On October 21, 1992, defendant moved for summary judgment in favor of Newton County under Count II. (R. 39). The district court entered a decision on January 20, 1993, granting summary judgment in favor of both defendants.

An appeal was taken and in a decision entered on March 21, 1994, the United States Court of Appeals for the Seventh Circuit affirmed the judgment of United States District Court for the Northern District of Indiana.

STATEMENT OF FACTS

Defendant Jeffrey Drinski (hereinafter referred to as "Drinski") was appointed as a patrolman by defendant, Newton County, Indiana (hereinafter referred to as "County") in September, 1989. Prior to that he was employed as a radio operator by the County. (Deposition of Jeffrey

Drinski at 5; hereinafter referred to as "Drinski").[1] His only other experience in law enforcement was as a jail officer from July 1987 to March 1988. (Drinski at 6). Drinski trained at the Indiana Law Enforcement Academy from October to December of 1989. (Drinski at 8).

Charles Mulligan was elected Sheriff of Newton County in 1987. (Deposition of Charles Mulligan at 8; hereinafter referred to as "Mulligan"). Mulligan had seven years experience as a patrolman and agent for the Baltimore City Police Department in the early 1970s. (Mulligan at 4-5).

At the Indiana Law Enforcement Academy, Drinski was trained on the subject of deadly force through lecture and interactive exercise. (Drinski at 11). The firearm trainings system utilized by the Academy does not train in the various aspects of confrontation including time, distance, barriers and pursuit. (Deposition of W. Kenneth Katsaris at 146-149; hereinafter referred to as "Katsaris"). Drinski did not attend any deadly force training courses after he left the Academy. (Drinski at 10). At the time Drinski started as a deputy for the County, he was handed all Department directives, including Directive 1.3 on deadly force, and instructed to read them. (Drinski at 28-29; Drinski Dep. Ex. No. 2; Mulligan at 16).

Section II-A of Department Directive 1.3 states that "[m]embers of this Department shall exhaust every reasonable means, before resorting to use of a firearm." (Katsaris at 140; Drinski Dep. Ex. No. 2, p. 2). Section III-A-5 of the Department Directive 1.3 states that officers may discharge their firearms only "[t]o effect the arrest or prevent the escape of a convicted felon or person who

---

[1] Numerous depositions were submitted into the record which form the factual basis for the record on appeal. The depositions were not sequentially numbered by the district court clerk. Therefore, in this petition the depositions are identified only by name and deposition page number.

has committed or attempted to commit a felony, when other means are insufficient . . ." (Katsaris at 142; Drinski Dep. Ex. No. 2, p. 3).

The County did not give any instruction on its deadly force policy. (Drinski at 29). The County's training of officers is limited to making certain publications and videos available to its officers. (Mulligan at 12). The County encourages its officers to view the training videos but does not require viewing. (Mulligan at 12-13).

In February, 1991, the County did not issue any intermediary weapons to its officers to be used as a means of self-defense or to effect an arrest, but in 1992 was considering adding such alternative weapons. (Mulligan at 45-46). Drinski was not trained in pursuit of a suspect on foot, (Drinski at 94-95; Mulligan at 66; Katsaris at 166-167), when to curtail pursuit of a suspect or when to retreat. (Drinski at 13-14, 141). Neither Sheriff Mulligan nor Drinski were trained in the value of a canine unit as a means of pursuing and subduing suspects. (Drinski at 141; Mulligan at 35, 67).

On February 2, 1991, Steven Whitt and Glen Cain responded to an auto accident on State Road 10. (Deposition of Butch Cain, at 3-4; hereinafter referred to as "Cain;" Deposition of Steven Whitt, at 7-11; hereinafter referred to as "Whitt"). Glen Cain and Steven Whitt were certified first responders for the Lake Township Volunteer Fire Department. (Whitt at 4). As first responders both Cain and Whitt had received medical training and frequently given medical aid at the scene of motor vehicle accidents. (Cain at 4, 50; Whitt at 5).

Upon arriving at the scene Whitt found that the car of plaintiff's decedent, Konstantino N. Plakas (hereinafter referred to as "Plakas") had left the north side of the road and come to rest across a deep ditch filled with water. (Whitt at 7-11). Butch Cain found Plakas walking

along State Road 10 and stopped to speak with him. (Cain at 5-8). Plakas stated that he was the driver of the vehicle found in the ditch. (Cain at 6). Plakas was wet from the waist down. Plakas stated that he was fine except that he was cold. (Cain at 6-7). Cain examined Plakas including feeling both the back and sides of his head. (Cain at 7, 50-51). Plakas was not injured and was not in need of medical treatment. (Cain 7, 12). Plakas was very cooperative and got in Cain's vehicle. Cain drove Plakas back to the accident scene about 1 mile away. (Cain at 8-9).

Corporal David Koby and Sergeant Buddy King of the Newton County Sheriff's Department were at the scene of the vehicle accident as well as Barry Watson, an ambulance driver. (Cain at 10-11). Butch Cain told Officer Koby to check Plakas for intoxication since he could smell alcohol on Plakas' breath and Plakas was dozing off. (Cain at 11). Plakas signed a waiver of medical treatment after being examined by the Newton County ambulance service. (Cain at 12). Plakas was cooperative and told Officer Koby he would go to the sheriff's department for a breathalyzer test. (Cain at 14). Koby cuffed Plakas behind the back and patted him down. (Whitt at 12-13; Perras 78-79). Plakas complained that being cuffed behind the back hurt the burn scars on his chest. (Whitt at 13). Plakas' chest was covered with scars from childhood burns. (Cain at 25). Officer Koby opened the rear driver's side door of his marked squad car and Plakas got in on his own. (Whitt at 14-15).

Whitt and Cain returned to the fire station and within minutes received a call that they should return to State Road 10 because Plakas had escaped from Koby's vehicle 2-4 miles east of the accident scene. (Whitt at 17-18; Cain at 15-16). Upon returning to the scene, Cain assisted in the search for Plakas in a field north of State Road 10 and west of a private driveway. (Cain at 17-18).

Roy and Joyce Ailes lived in a house at the end of a long private lane to the north of State Road 10. (Deposition of Joyce Ailes at 4-6; hereinafter referred to as "J. Ailes"). Plakas had been dating their daughter Rachael Ailes for about four years and they were engaged to be married. (J. Ailes at 6-7). The Ailes house is the last house on the private lane and there is a state game preserve to the north of their property. (J. Ailes at 6, 15).

At around 10:00 p.m. that night, Joyce Ailes heard a loud bang outside her daughter's window. She looked outside the window and saw Plakas, who they refer to as "Dino." (J. Ailes at 6-7, 20-22). Joyce Ailes opened the door to let Plakas in and he fell into their living room. Plakas was handcuffed behind the back. Joyce and Rachael Ailes helped Plakas sit up. His shoes, pants and shirt were wet. Plakas stated that he had wrecked his car. (J. Ailes at 23-25). Plakas also stated that he needed help. (J. Ailes at 90). Plakas had multiple lumps to the head and bruises to his legs. (J. Ailes at 90-92; R. Ailes at 12, 30). It appeared that Plakas was in need of medical attention and was blacking out because of the head injuries. (J. Ailes at 92-93). They attempted to dry Plakas off and changed his wet socks. (J. Ailes at 94).

Roy Ailes entered the living room and spoke to Plakas. (J. Ailes 27; 96). Plakas was very upset and the Ailes tried to calm him. (Roy Ailes at 10; hereinafter referred to as "R. Ailes"). Plakas kept stating that he didn't do anything wrong. (R. Ailes at 10). The Ailes family calmed him down. (R. Ailes at 61). Mr. Ailes could see the lights from the police cars on State Road 10 from the windows of their house. (R. Ailes at 14). Roy Ailes told Plakas that he could not run from the police and he would help straighten things out. (R. Ailes at 14). Plakas agreed that Roy Ailes should go talk to the police rather than have them rush in on him. (R. Ailes at 14, 16). Roy Ailes got in his truck and drove down the private lane to State Road 10. (R.

Ailes at 18-19). When he reached the road he saw a Newton County squad car and police officers with flashlights. (R. Ailes at 18-19). He also saw fireman Cain and advised Mr. Cain that Plakas was at his house and was willing to come out and talk to them. (R. Ailes at 19).

Trooper Lucien Mark Perras of the Indiana State Police had responded to the scene and was assisting in the search for Plakas when Roy Ailes arrived. (Deposition of Lucien Mark Perras at 19-21; hereinafter referred to as "Perras"). He heard Roy Ailes advise Cain that Plakas was his daughter's boyfriend and was up at his house. (Perras at 21-22; R. Ailes at 19; Cain at 19). Roy Ailes waited by the State Road to direct other officers to the house. (R. Ailes at 19-20). Trooper Perras drove his squad car up the driveway and parked near the Ailes house. (Perras at 23). At that time Newton County Officers Drinski, Koby and King also arrived at the Ailes house, together with fireman Cain (Perras at 23; Cain at 20). Drinski positioned himself to watch the back door of the house. (Cain at 20).

At that point Plakas had not been violent and there was no reason to believe he would be violent. (Cain at 20; J. Ailes at 40). Glen Cain approached the front door of the Ailes house. (Cain at 21-22). He observed Plakas stepping through the handcuffs and getting them in front of his body. (Cain at 21). Cain entered through the front door with Officer Koby behind him. (Cain at 21). Plakas' calm disappeared when Cain entered the house and the tension escalated as Koby entered. (J. Ailes at 96, 99-100). Plakas jumped up and stated "I don't want anyone to hurt me." (Cain at 23). Plakas said to Koby "You hurt me." (J. Ailes, 97). He also complained that the handcuffs were hurting the scar tissue on his chest. (J. Ailes at 51; Cain at 24-25).

Plakas backed into the corner of the living room and as he backed up he bumped the fireplace tools, reached down and picked up a fireplace poker. (J. Ailes at 50; Cain

at 26). The fireplace poker was 2-3 feet long with a hook on the end. (Cain at 26-27). Plakas gripped it like a baseball bat. (Cain at 26). He was not swinging it but screamed at Cain and Koby. (Cain at 27). Plakas was not a threat to the Ailes family. (J. Ailes at 96; Cain at 29). Joyce Ailes had no fear for her life. (J. Ailes at 81). Several minutes after Plakas picked up the poker he rushed at Officer Koby and swung at Koby, striking him on the arm, as Koby ran out the front door. (J. Ailes at 56, 61; Cain at 27). Officer Koby never drew his gun while in the house. (J. Ailes at 105). Drinski and Trooper Perras then entered the house through the garage door with guns drawn. (Perras, at 24; J. Ailes at 105). As they entered they saw Plakas run out the front door. (J. Ailes at 64, 111; Perras at 24-25).

Roy Ailes arrived back in the yard of his house just as Plakas was coming out the front door. (R. Ailes at 24-25). Plakas stopped in the yard after bolting out of the house. (R. Ailes at 25, 29). The police officers drew their guns and Mr. Ailes jumped in and yelled, "Don't shoot, I'll talk to him." (R. Ailes at 29-30). The area of the yard was well lit. (R. Ailes at 30-31). Roy Ailes stood between the police officers with their drawn guns and Plakas. (R. Ailes at 31). Roy Ailes tried to get Plakas to put the poker down and surrender. (R. Ailes at 31-32). As Roy Ailes talked to Plakas, Plakas slowly backed down a hill in the Ailes' yard. (R. Ailes at 33-35, 68; Perras at 32). When they got to the bottom of the hill Plakas again stopped and listened to Roy Ailes, who was trying to convince Plakas to surrender. (R. Ailes at 35-36). Ailes thought for a moment that Plakas might put down the poker. (R. Ailes at 38). Plakas lowered the poker and there were changes in his demeanor that suggested he might surrender. (R. Ailes 65-66). As police moved in behind Ailes, Plakas turned, tripped over a wire fence, and ran. (R. Ailes at 38-39). The police then pursued Plakas while Roy Ailes returned to the area of the squad

cars. (R. Ailes at 41). The snow on the ground helped to illuminate the area and he could see them for some distance. (R. Ailes at 70-71).

Drinski pursued directly behind Plakas followed by Trooper Perras and Sergeant Buddy King. (Perras at 35, 42). Drinski and Perras were yelling, "Stop, police." (Perras at 33). Drinski and Perras had their guns drawn. (Perras at 33). Plakas was still cuffed in front, palm to back of hand. (Perras at 34). The police had no trouble keeping up with Plakas. (Perras at 35). The moon was bright and they had no trouble seeing Plakas even without flashlights. (Perras at 35). He left tracks in the snow as he crossed the field. (R. Ailes at 74).

As Plakas entered some thick brush he slowed down. (Perras at 36). After Plakas got through the thick brush he entered a clearing. (Perras at 37). The police maintained a distance of at least 10 feet. (Perras at 37). Plakas crossed the clearing, came up against heavy brush on the east side, stopped and faced them. (Perras at 38). They spoke for approximately 15 minutes. (Drinski at 64). Drinski told Plakas to surrender. (Perras at 40). Drinski also told Plakas that he could hit Drinski with the poker, as long as it was not in the head. (Katsaris at 119; deposition of Buddy King at 76; hereinafter referred to as "King;" King Dep. Ex. No. 3). At that time, Plakas was calm and the poker was resting on the ground. (Drinski at 64-66). Buddy King remained on the west edge of the brush outside of the clearing. (Perras at 41-42). Perras, Drinski and King never stopped to discuss strategy or their options. (Perras at 42). Drinski was holding a flashlight in his left hand and his gun in his right hand. (Perras at 44).

Plakas attempted to break through some thick brush on the southern edge of the clearing but could not. (Perras at 39, 44). Drinski positioned himself directly in front of the opening that Plakas had entered. (Perras at 44).

Perras was positioned to Drinski's left. (Perras at 44). Drinski and Perras stood about ten feet from Plakas. (Perras at 37). They continued to talk to Plakas for a few minutes. (Perras at 45). Plakas took a step toward Drinski, Drinski fired his gun and Plakas immediately fell to the ground, his body lying within a foot of the thick brush in the southeast corner of the clearing. (Perras at 45-49; Whitt at 27-28). There were small saplings in the clearing, but Drinski did not trip over any or fall down. (Perras at 47).

The shot was fired at approximately 11:00 p.m. (Perras at 74). At the time the shot was fired Perras did not feel he was threatened with bodily injury. (Perras at 48). The only weapon the handcuffed Plakas had was a poker. (Perras at 78-79). Drinski aimed at the center of Plakas' chest. (Drinski at 81). Drinski's bullet struck Plakas in the mid-chest. (Perras at 55-56). Plakas was semiconscious and moaning after being shot. (Perras at 55-56). The handcuffs were removed. (Whitt at 32). Plakas died soon thereafter from the gunshot wound.

At the time of the confrontation in the clearing, Perras had a canister of CS repellant on his belt. (Perras at 58). CS repellant is a weapon of intermediary force designed to be used at a distance of about ten feet. (Perras at 64-65). It is sprayed in the face of a suspect to subdue him without any permanent injury (Perras at 64-66). From the right distance it could have been used against a suspect holding a poker. (Perras at 66).

Approximately 10 minutes before Plakas was shot, Newton County Sheriff, Charles Mulligan, radioed and asked whether Drinski and King needed a canine unit. (*See* Answer to Request to Admit No. 1; Cain at 33-35, 47-48). The Newton County officers responded that a canine unit was not needed. (*See* Answer to Request to Admit No. 1; Cain at 33-35, 47-48). A canine unit trained to track, grasp and disarm suspects without serious injury could have been

brought in from Lake County in about 30 minutes. (Mulligan at 32-36, 59-62; Drinski at 125-131). At any time Drinski could have curtailed the pursuit without injury to himself or others. (Perras at 80). They were not aware of anyone else being in the isolated, wooded area. (Perras at 80-81). Drinski did not need to shoot Plakas to prevent his escape. (Perras at 82).

Drinski passed over nonlethal intermediary force options such as canines and tear gas. (Katsaris at 107-108). Drinski did not recognize that there are numerous intermediary weapons available, including chemical sprays and canines, which should be employed before deadly force. (Katsaris at 88-89, 143; Drinski at 126, 130-131). Drinski believed, based upon his training at the Academy, that the next level of force above a sharp-edged weapon would be a gun. (Drinski at 27, 34). Drinski also believed that based on his training he would have been justified in shooting Plakas even before the distance was closed and he believed Plakas became an immediate threat. (Drinski at 111-113). In the opinion of Sheriff Mulligan there was no need to shoot the suspect as long as distance was maintained. (Mulligan at 23).

ARGUMENT

I.

THE SHOOTING OF PLAKAS BY A POLICE OFFICER WAS UNREASONABLE UNDER THE TOTALITY OF THE CIRCUMSTANCES.

In affirming the grant of summary judgment in favor of Drinski, the United States Court of Appeals for the Seventh Circuit held that "where deadly force is otherwise justified under the Constitution there is no constitutional duty to use nondeadly alternatives first." *Plakas v. Drinski*, 19 F.3d 1143 (No. 93-1431 at 11) (7th Cir. 1994). The Court further held that the fact that another

Newton County officer may have provoked Plakas to attack Drinski could not render the shooting of Plakas unreasonable. *Plakas*, at 10. In reaching its decision the Seventh Circuit departed from its earlier decisions and created conflicting law among the circuits. The Seventh Circuit's decision is inconsistent with this Court's pronouncement in *Tennessee v. Garner*, 471 U.S. 1, 8-9 (1985), that the constitutionality of a particular search and seizure should be determined based upon the totality of the circumstances. *See also Graham v. Connor*, 490 U.S. 386, 396 (1989).

A. The Shooting Of A Citizen By A Police Officer Is Unreasonable Under The Fourth Amendment Where The Police Officer Fails To Use Alternative Nonlethal Means To Effect The Arrest.

The United States Court of Appeals for the Seventh Circuit held that Drinski was under no constitutional duty to maintain distance from Plakas, to keep barriers between himself and Plakas, to attempt to disable Plakas through the use of a chemical spray or to attempt to disarm him through the use of a police dog. *Plakas* at 10-11. The Court held that "[t]here is no precedent in this Circuit (or any other) which says that the Constitution requires law enforcement officers to use all feasible alternatives to avoid a situation where deadly force can justifiably be used." *Plakas* at 11. However, prior to its decision in the instant case the Seventh Circuit had considered the nonlethal alternatives available to a police officer in determining whether the use of deadly force was reasonable under the fourth amendment. The law in the Seventh Circuit is now in conflict with the law in the Ninth Circuit which requires a factual inquiry into whether a reasonable nonlethal alternative existed for apprehending a suspect at the time deadly force was utilized.

In *Tom v. Voida*, 963 F.2d 952 (7th Cir. 1992), the Seventh Circuit evaluated the other means available to

the defendant officer at the time the defendant used deadly force. The court stated that the officer could not have subdued the plaintiff "through lesser means, as she did not have her nightstick with her and she feared reaching for her chemical repellant would expose her weapon to Tom's grasp." *Tom*, 963 F.2d at 962. It concluded "Tom could not have been subdued except through gunfire." *Id.* Implicit in the court's analysis in *Tom* is the holding that alternative lesser force options must be considered in determining whether a seizure was constitutional. Similarly, in *Klein v. Ryan*, 847 F.2d 368, 375 n.9 (7th Cir. 1988), the Seventh Circuit stated that an officer had the alternative of moving out of the way of the suspect, and thus deadly force would not be necessary to prevent harm to the officer or other individuals.

Prior to the Seventh Circuit's decision in the instant case, the law regarding the use of alternatives to deadly force in the Seventh Circuit was consistent with the law in the Ninth Circuit. In *Brower v. County of Inyo*, 489 U.S. 593 (1989), *appeal after remand*, 884 F.2d 1316 (9th Cir. 1989), this Court held that a police attempt to stop a fleeing suspect through use of a roadblock was a seizure within the meaning of the fourth amendment and remanded the case for consideration of whether the roadblock did effect a seizure that was "unreasonable." *Brower*, 489 U.S. at 599-600. On remand the district court dismissed the complaint for failure to state a claim. On appeal after remand the Ninth Circuit held that the fourth amendment claim could not be dismissed for failure to state a claim. *See Brower*, 884 F.2d at 1318. The Court applied the two-part test set out in *Garner*. The Court reasoned that even if the "significant threat" prong of *Garner* were satisfied, there remained a question of fact as to whether a non-deadly alternative existed. *See Brower*, 884 F.2d at 1317-1318. The Ninth Circuit reversed the district court's dismissal of the Complaint and remanded the case, stating as follows:

> "Necessity is the second prerequisite for the use of deadly force under *Garner*. The necessity inquiry is a factual one: Did a reasonable non-deadly alternative exist for apprehending the suspect? . . . Here, it cannot be said with certainty that no non-deadly alternative existed."

Brower, 884 F.2d at 1318.

The diverging law in the Seventh and Ninth Circuit stems from different applications of *Garner*, a case in which this Court stated as follows:

> "Where the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force. Thus, if the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm, deadly force may be used *if necessary* to prevent escape, and if, where feasible, some warning has been given."

Garner, 471 U.S. at 11-12 (emphasis added). In applying *Garner* the Ninth Circuit has held that the use of deadly force is not necessary, if a reasonable nondeadly alternative existed for apprehending the suspect. Prior to its decision herein, the Seventh and Ninth Circuits interpreted *Garner* in the same manner. The Seventh Circuit, however, has now clearly denounced its earlier decision in *Tom v. Voida*, stating as follows:

> "It is obvious that we said Voida thought she had no alternatives. But did we hold that this imposes a constitutional duty to use (or at least consider) the use of all alternatives?
>
> The answer is no. *Tom v. Voida* did not, and did not mean to, announce a new doctrine . . . As Plakas moved toward Drinski, was he supposed to think of an attack dog, of Perras's CS gas, of how fast he

> could run backwards? Our answer is, and has been, no because there is too little time for the officer to do so and too much opportunity to second-guess that officer."

Plakas at 13.

In holding that a police officer need not use available nonlethal means to effect a seizure, the Seventh Circuit relied in part upon this Court's decision in *Illinois v. Lafayette*, 462 U.S. 640 (1983). In *Lafayette* this Court held that the reasonableness of any particular governmental activity does not necessarily or invariably turn on the existence of alternative less intrusive means. *Lafayette*, 462 U.S. at 647. More recently, in assessing the constitutionality of an investigatory stop this Court stated: "[t]he question is not simply whether some other alternative was available, but whether the police acted unreasonably in failing to recognize or to pursue it." *United States v. Sharpe*, 470 U.S. 675, 687 (1985). The issue in *Lafayette* was the reasonableness of a police inventory search of an arrestee's personal effects incident to incarceration. A citizen's privacy interest in the contents of his car, subsequent to arrest, cannot compare to his right to life. As this Court stated in *Garner*, a "suspect's fundamental interest in his own life need not be elaborated upon." *Garner*, 471 U.S. at 9. Therefore, *Lafayette*, which was decided prior to *Garner*, is not dispositive of the deadly force issue in this case.

In the Seventh Circuit, a police officer who, in attempting to prevent the escape of a handcuffed fleeing suspect, chases the suspect until cornered and approaches to a distance that the officer feels threatened with serious physical harm may use his gun to kill the suspect. His actions are deemed reasonable as a matter of law even if the suspect could reasonably have been taken into custody without serious risk of harm to anyone. The Ninth Circuit, in contrast, interprets the *Garner* necessity prong as re-

quiring that nondeadly alternatives be utilized if reasonably capable of subduing a suspect without injury to the police officer.

The divergent opinion of the Seventh Circuit has created an anomaly in which the fourth amendment permits a police officer in the Seventh Circuit to shoot a suspect although he could have been taken into custody alive through the use of chemical sprays, police dogs or other intermediate means of force. In the Ninth Circuit the fourth amendment protects a citizen from the same police conduct. The Constitution requires police use of force to be reasonable and necessary. Given that force is sometimes necessary, is not the most reasonable force that which is both effective and least injurious? This Court should grant certiorari, and further define the necessary use of deadly force by a police officer as permitted under the fourth amendment.

B. The Shooting Of A Citizen By A Police Officer Violates The Fourth And Fourteenth Amendments Where The Unreasonable Conduct Of Police Officers At Any Time During The Pursuit Of A Suspect Creates The Justification For The Use Of Deadly Force.

The plaintiff produced evidence in the district court that Newton County Officer David J. Koby beat Plakas after Plakas was detained, patted down and handcuffed. The plaintiff also produced evidence that Drinski invited Plakas to strike him with the fireplace poker shortly before Drinski fired the fatal shot, claiming self-defense. The Seventh Circuit failed to see the relevancy of this evidence to the issue of reasonable use of deadly force. *See Plakas* at 9-14. The Seventh Circuit's focus only on the moment immediately preceding the police shooting is inconsistent with this Court's holdings in *Garner* and *Graham* that in assessing the reasonableness of a search or seizure a court must consider the totality of the circumstances. *See Garner*, 471 U.S. at 8-9; *Graham*, 490 U.S. at 396. The Seventh Cir-

cuit's narrow view of the relevant time frame preceding the police shooting is a departure from its earlier decisions and in conflict with the law in at least one other circuit that has considered this question.

In *Tom v. Voida*, 963 F.2d 952 (7th Cir. 1992), the Seventh Circuit considered the issue of reasonable use of deadly force by scrutinizing all areas of police conduct leading up to the shooting, summarizing its decision as follows:

> ". . . Voida was justified in attempting to handcuff Tom because she then had a reasonable suspicion that he was engaged in criminal activity. In addition, Tom's continued flight from her, even after she had ordered him to stop, had given her probable cause to arrest him. Voida was justified in following him after the initial physical encounter because by this time he had committed at least two crimes. And she was ultimately justified in using deadly force because Tom had already inflicted serious bodily injury on her and threatened to continue doing so."

Tom, 963 F.2d at 962. In the instant case the Seventh Circuit stated that, as in *Tom*, the proper analysis is to "carve up the incident into segments and judge each on its own terms to see if the officer was reasonable at each stage." *Plakas* at 14. However, the court expressly declined to consider the consequences of prior police conduct on the ultimate use of deadly force. The court found that Drinski had acted reasonably up to the time he was facing Plakas in the clearing; therefore, the sole focus in determining whether Drinski acted reasonably in shooting Plakas was from that point forward. As the court stated:

> "All of this means Drinski was properly standing in the clearing, gun in hand, several feet away from Plakas, who charged him with the poker raised. It is from that point on that we judge the reasonableness of the use of deadly force in light of all that the officer knew. We do not return to the prior segments of the event and, in light of hindsight, reconsider whether the prior police decisions were correct."

Plakas at 14. In taking this "snapshot" view of the shooting and basing its reasonableness determination only on the circumstances at the moment the shot was fired, the court avoided the evidence that Plakas was beaten by Newton County Officer Koby. The court also avoided the issue by holding that even excessive force exerted by another officer in the department after Plakas' arrest would not render Drinski's claim of self-defense unreasonable, stating as follows:

> "Even if Koby did beat Plakas, Koby was not at the scene of Plakas's demise. The officers who confronted Plakas were not the officers who injured him and should be able to claim self-defense. The proposition that an officer who beats John Doe may not use self-defense to justify killing Doe, who later attacks him, rests on the idea that because the officer's wrongful acts caused the attack, he cannot take advantage of his fear of retaliation to defend against liability. Drinski did not cause Plakas to attack him. He can claim self-defense to shooting Plakas."

Plakas at 10 (citations and footnote omitted). Finally, the Seventh Circuit dispensed with the issue whether Drinski himself unreasonably provoked an attack by Plakas, by inviting Plakas to strike him, in a footnote to the opinion, stating in part as follows:

> "There is no contention that this 'invitation' immediately preceded the shooting or caused Plakas to charge Drinski. The only argument in this case is that Plakas did not charge at all."

Plakas at 16. However, the Court overlooked this issue which was stated in Plakas' reply brief as follows:

> "Drinski invited plaintiff to strike him with the poker, knowing at the time that he was irrational. (King Dep. Ex. 3 at 4; King at 76-77; Katsaris at 119). A reasonable officer would not invite an irrational suspect to strike, and then shoot him."

Reply Brief of Plaintiff-Appellant at 7.

In *Gilmer v. City of Atlanta*, 774 F.2d 1495, 1502 (11th Cir. 1985), *cert. denied*, 476 U.S. 1115 (1986), the Eleventh Circuit held that a series of constitutional violations could render "unreasonable" the eventual use of deadly force when the suspect retaliates against the officer. In *Gilmer* the plaintiff's decedent, Patillo, was beaten by two police officers and then shot as he moved toward one of the officers. The Court found that the shooting violated Patillo's fourth and fourteenth amendment rights, stating:

> "[A]ny fear on the officer's part was the fear of retaliation against his own unjustified physical abuse. We conclude that a moment of legitimate fear should not preclude liability for a harm which largely resulted from his own improper use of his official power.
>
> . . .
>
> "Furthermore, the police had little cause to believe Patillo himself to be dangerous. Given his small size, intoxicated state, and lack of a weapon, he clearly posed little threat to their safety when they initially began escorting him to the patrol car. Finally, . . . Patillo did little to provoke the police officers to beat him. That unwarranted intrusion, as well as the unwarranted shooting which directly resulted from his efforts to escape the officers' further physical abuse, give grounds for relief under the fourth amendment.

Gilmer, 774 F.2d at 1501-1502.

The Eleventh Circuit, in *Gilmer*, correctly applied this Court's ruling in *Garner* and considered all circumstances leading up to the use of deadly force, including the series of constitutional violations. The Eleventh Circuit concluded that an officer's unjustified beating of a suspect will invalidate the use of deadly force when the suspect retaliates against the officer. A seizure may be unreasonable if the officer creates the need to use deadly force. As the Ninth Circuit stated in *Brower*:

> "It is not clear from *Garner* that the 'substantial threat' requirement is satisfied by danger that is pres-

> ent only as a result of police pursuit . . . . In this case it might be argued that the substantial threat requirement was not met because any danger proceeded from the fact that the police gave chase. This is not to say that the police should never chase suspected car thieves, only that the danger created by the chase would not give them license to use deadly force when it is necessary to prevent escape."

Brower, 884 F.2d at 1317-1318 n.1. In another recent decision, the Seventh Circuit referred to the foregoing footnote in *Brower* in stating that "[t]he Supreme Court has not clearly delineated the scope of the *Garner* exception." *Donovan v. City of Milwaukee*, 17 F.3d 944 (7th Cir. 1994). However, in *Donovan* the Court did not consider whether the "substantial threat" requirement of *Garner* was satisfied by the danger that was present only as a result of Officer Zirbes' pursuit, holding "[b]ecause we decide this case on qualified immunity grounds . . . we need not decide today whether Zirbes' alleged conduct actually violated the Fourth Amendment." *Donovan*, 17 F.3d at 944. The Seventh Circuit appears to have earlier decided this issue in *Starks v. Enyart*, 5 F.3d 230 (7th Cir. 1993), stating as follows:

> "If a fleeing felon is converted to a 'threatening' fleeing felon *solely* based on the actions of a police officer, the police should not increase the degree of intrusiveness. In other words, we have no countervailing governmental interest in unreasonable police conduct that would justify a greater intrusion on the individual's rights."

However, in the instant case the Seventh Circuit departed from *Starks* without comment. The Seventh Circuit should have considered whether the foot pursuit and other police conduct converted Plakas from a "fleeing felon" to a "threatening fleeing felon." The Seventh Circuit erred in limiting the inquiry to the circumstances that exist at the precise moment the shot was fired.

The conduct of police in creating the need to use deadly force in self-defense would violate either the fourth amendment right not to be subjected to unreasonable seizures or the right to substantive due process under the fourteenth amendment. However, substantive due process analysis is inherently subjective and police officers might be unable to predict when certain conduct will shock the conscience. Note, *Police Liability for Creating the Need to Use Deadly Force in Self-Defense*, 86 MICH. L. REV. 1982, 2006-2007 (1988). The fourth amendment balancing test is susceptible to universal rulemaking which will give clearer guidance to police. *Id.* at 2008-2009. In the instant case, this Court should find that the police seizure of Plakas violated his fourth amendment rights.

The initial seizure of Plakas took place when Officer Koby handcuffed him. The handcuffing of Plakas' arms behind his back caused Plakas great pain because he had burn scars up and down his chest. The seizure became unreasonable as Plakas was beaten and mistreated by officers of Newton County.

At the time Plakas was taken into custody he was examined by medical personnel who determined that he had no lumps or injuries to his head and was not in need of medical treatment. (Cain at 7, 12). After being taken into custody, Plakas allegedly escaped from a locked squad car with his hands cuffed behind his back. (Whitt at 17). He arrived at the Ailes house with bruises on his head and in obvious need of medical treatment. (J. Ailes at 90-93; R. Ailes at 12, 30). Plakas had been very cooperative when arrested but later became enraged at the sight of the police. (Cain at 7; J. Ailes at 96). At the Ailes house Plakas stated to Officer Koby "You hurt me." (J. Ailes at 97). These facts, when read in the light most favorable to the plaintiff, permit a jury to infer that Plakas was beaten after being taken into custody and handcuffed. The application of such force was patently unreasonable.

After Plakas ran out of the Ailes home, Drinski, along with two other officers, pursued him on foot with their guns drawn, and eventually cornered Plakas. Encroaching upon an individual is a level of force. (Katsaris at 154). This force, in light of the circumstances, was unreasonable because Plakas did not pose a threat of harm unless someone closed in on him. Thus, Drinski could have maintained his distance and negotiated with Plakas to the point of surrender or used other nonlethal force options. By encroaching upon Plakas, Drinski created any threat of imminent harm there may have been. When Drinski made a conscious decision to eliminate all nonlethal means of effecting a seizure, he in effect created any need for the use of deadly force (*see* Katsaris at 98). Drinski's unreasonable conduct continued as Drinski invited Plakas to strike him with the poker as long as he did not strike him in the head. The unnecessary use of force to escalate the threat of harm invalidates the subsequent use of deadly force, regardless of whether the unnecessary force was used by Drinski or by another officer in his department.

In the instant case, if Drinski had handed the unarmed plaintiff the fireplace poker and minutes later shot him at close distance because of the threat of the poker, the shooting would be justified under the Seventh Circuit's analysis, notwithstanding the outrageousness of the police conduct. The need for a broader inquiry is just as apparent on the facts of record where Drinski and his fellow officer created any justification for the shooting by first provoking him to resist arrest then approaching to within a close distance and offering to let Plakas strike him with the poker. This Court should adopt a standard of reasonableness that would prohibit police from creating the need to use deadly force in self-defense.

The issue of whether the shooting itself was unconstitutional should not be examined in isolation from other

police conduct. The prior unconstitutional acts render the ultimate act unconstitutional, even if that use of deadly force appeared justified by the immediate threat presented. The Seventh Circuit has failed to consider the totality of the circumstances leading up to the use of deadly force in determining the constitutionality of the seizure. The Seventh Circuit's analysis is at odds with prior decisions of this Court and the Eleventh Circuit. This Court should grant certiorari and resolve the conflict among the circuits. A more expansive consideration of the circumstances preceding the use of deadly force by a police officer would ensure that a citizen's right to be free from unreasonable searches and seizures is protected.

II.

THE MUNICIPALITY VIOLATED THE CITIZEN'S RIGHT NOT TO BE SUBJECTED TO AN UNREASONABLE SEIZURE BY IMPROPERLY TRAINING AND EQUIPPING ITS POLICE OFFICERS.

The Seventh Circuit affirmed the district court's entry of summary judgment in favor of Drinski; therefore, the court did not address the issue whether the County failed to properly train its officers. Plakas presented expert testimony in the district court that the County improperly trained its officers in several respects resulting in the death of Plakas. This Court should grant certiorari to consider the scope of police training required by its decision in *City of Canton v. Harris*, 489 U.S. 378 (1989). This Court should also grant certiorari to consider whether the fourth and fourteenth amendments impose a duty on municipalities to equip their officers with weapons that can be safely used to subdue a suspect without resulting in serious bodily injury or death. The Seventh Circuit, in the instant case, found that a governmental unit has no constitutional duty to adequately equip its officers.

A. The Municipality Acted In Conscious Disregard Of The Citizen's Right Not To Be Subjected To An Unreasonable Seizure By Failing To Train Its Police Officers.

Liability may be imposed upon a municipality under §1983 based upon the municipality's "deliberately indifferent" training policies if those policies are shown to be a direct cause of the violation of the plaintiff's federally protected rights. *City of Canton*, 489 U.S. at 388. A deliberate indifference to training is established if, in view of the duties assigned to an officer, the need for enhanced training is so obvious that the inadequacy of training is likely to result in the violation of constitutional rights. *Erwin v. County of Manitowac*, 872 F.2d 1292, 1298 (7th Cir. 1989). Plakas had a federally protected right to be free from unreasonable seizures. The failure of the county to train Drinski resulted in the violation of Plakas' constitutional right.

In *Davis v. Mason County Washington*, 927 F.2d 1473, 1482 (9th Cir. 1991), *cert. denied*, 112 S. Ct. 275 (1991), the court, citing *City of Canton*, held that the "County's failure to adequately train its deputies [with respect to lawful use of force] constituted deliberate indifference as a matter of law." "The issue is not whether the officers had received *any* training—most of the deputies involved had some training, even if it was minimal at best—rather the issue is the adequacy of that training." *Davis*, 927 F.2d at 1483. Other courts have held that a municipality may be liable for improperly training its officers on matters relevant to the instant case. *See, e.g. Kerr v. City of West Palm Beach*, 875 F.2d 1546, 1556-71 (11th Cir. 1989) (use of a canine); *Frye v. Town of Akron*, 759 F. Supp. 1320, 1325 (N.D. IN. 1991) (subject of pursuit); *Wierstak v. Heffernan*, 789 F.2d 968, 975 (1st Cir. 1986) (subject of pursuit); *Parker v. District of Columbia*, 850 F.2d 708, 713 (D.C. Cir. 1988), *cert. denied*, 489 U.S. 1065 (1989) (arrest procedures); and *Russo v. City of Cincinnati*, 953

F.2d 1036 (6th Cir. 1992) (dealing with mentally disturbed or intoxicated suspects).

Plakas' expert, Ken Katsaris, testified to several deficiencies in the County's training program. His testimony presents a sufficient factual basis for finding that the County's inadequate training of its officers caused Plakas' death. Ken Katsaris is a former sheriff who presently trains police officers nationally on the use of force. Ken Katsaris reviewed the depositions of several County employees and other witnesses at the scene and formed opinions based on their testimony. (Katsaris at 34). In his expert opinion, Drinski's training was inadequate on the subject of deadly force and resulted in the death of Plakas.

The police expert based his opinion on the fact that the training that Drinski received at the Academy was one dimensional and did not adequately train Drinski in the use of deadly force and how to deal with confrontation. (Katsaris at 125, 138-160). The County did not train Drinski on its deadly force policy. (Drinski at 29). A police department should reasonably know that a deadly force policy will not be followed unless the department instructs its officers on the policy. (Katsaris at 125, 138, 141-142, 160). Based upon his inadequate training at the Academy, Drinski passed over nondeadly force options, and the result of the failure to train was a needless death. (Katsaris at 89, 107-108; Drinski at 27, 34). As a result, Drinski violated the County's own policy which required that officers exhaust every reasonable means before resorting to deadly force. (Katsaris at 140, 142; Drinski Dep. Ex. No. 2, pp. 2-3).

In addition, Drinski and Sheriff Mulligan were utterly untrained in the use of canine units as an intermediary force option. (Drinski at 141; Mulligan at 35, 67). The County's training program was below national standards. The inadequate training resulted in Drinski not recogniz-

ing an available canine unit that was suggested by the sheriff over the radio as an alternative option to deadly force which could have been used to intimidate Plakas into surrendering or to disarm Plakas, sparing his life. (Katsaris at 110; Drinski at 126, 130-131).

Drinski's lack of training in the use of chemical agents also contributed to the death of Plakas. As a result of improper training Drinski failed to consider and use a chemical agent to subdue Plakas. (Katsaris at 107-108, 110). Further, Drinski was not trained in the means of pursuing a suspect on foot. Drinski was not trained in when to curtail pursuit of a suspect or when to retreat. (Drinski at 13-14, 141). Under nationally recognized standards he should have maintained distance and barriers between himself and the suspect. (Katsaris at 89-90). A reasonably trained officer would have known that a handcuffed arrestee, who was cold and inebriated, should not be cornered or encroached upon but should be given time to surrender. (Katsaris at 152-154). Drinski was improperly trained in that he approached to within 10-12 feet of a suspect armed with an impact weapon without maintaining barriers between himself and the suspect. (Katsaris at 90-91, 97). Drinski's invitation to let Plakas hit him with the poker as long as he did not hit Drinski in the head also reflects improper training. (Katsaris at 119). As a result, Drinski shot a traffic violator who was not attempting to injure or take life but to flee. (Katsaris at 117).

A reasonably trained officer would have an understanding of human behavior. (Katsaris at 152). Drinski should have known that Plakas was drunk and acting irrational, and that given time he would have calmed. (Katsaris at 151). The officer should also have known that being cold, wet and handcuffed was a handicap. (Katsaris at 151-154). Drinski should have merely kept Plakas in sight from a distance until he was ready to give up or nondeadly force options were utilized. (Katsaris at 150-154).

The police expert testimony provides evidence for the trier of fact to find that the County's training in the areas of use of deadly force, pursuit and confrontation of a suspect armed only with an impact weapon, alternatives to deadly force, and dealing with a mentally disturbed or intoxicated suspect was inadequate resulting in the death of Plakas. This Court should grant certiorari to clarify the duty to train police officers established in *City of Canton* and determine whether the expert testimony presented is sufficient to establish a deliberate indifference to the rights of citizens with whom the police come in contact.

B. The Municipality Acted In Conscious Disregard Of The Citizen's Right Not To Be Subjected To An Unreasonable Seizure And Right To Due Process Of Law By Failing To Equip Its Police Officers With Nonlethal Weapons.

The use of deadly force against Plakas resulted from the County's failure to equip its officers with intermediary force weapons. The Seventh Circuit held that there is no constitutional duty to equip police officers to confront a suspect who is fleeing or resisting arrest. By failing to adequately equip its officers to deal with a foreseeable situation, however, the County created the circumstances that resulted in Plakas' death. In only equipping its officers with firearms the county violated Plakas' fourth amendment right not to be subjected to unreasonable seizure and his fourteenth amendment right to due process of law.

In February, 1991, it was the policy or custom of the County to equip its police officers with nothing more than a handgun, shotgun, handcuffs, flashlight and radio. (Drinski at 100-101). At that time the County did not issue, or make available, intermediary force weapons such as impact weapons (baton) or chemical sprays (tear gas). (Drinski at 100-106). The County now issues tear gas and is

considering other intermediary force options such as nightsticks. (Drinski at 105; Mulligan at 45-56). It is nationally recognized that police officers should have available to them some form of intermediary force. (Katsaris at 47, 64). In February, 1991, the County was operating under a policy or custom that resulted in the excessive use of force and deprived Plakas of his constitutional rights.

This Court has held that a municipality may be liable for adopting a policy, or following a custom or practice, that deprives citizens of their constitutional rights. *See Monell v. Dept. of Social Services*, 436 U.S. 658 (1978). In the instant case, the Seventh Circuit refused to extend *Monell* to require police departments to supply their officers with equipment that allows the apprehension of suspects without risk of serious injury to the police or the suspect. In rejecting Plakas' contention that the fourth and fourteenth Amendments impose on police departments a duty to equip, the Seventh Circuit stated as follows:

> "We do not think it is wise policy to permit every jury in these cases to hear expert testimony that an arrestee would have been uninjured if only the police had been able to use disabling gas or a capture net or a taser (or even a larger number of police officers) and then decide that a municipality is liable because it failed to buy this equipment (or increase its police force). There can be reasonable debates about whether the Constitution also enacts a code of criminal procedure, but we think it is clear that the Constitution does not enact a police administrator's equipment list. We decline to use this case to impose constitutional equipment requirements on the police."

Plakas at 15-16 (footnotes omitted). In reaching its decision the Seventh Circuit relied in part upon *Salas v. Carpenter*, 980 F.2d 299 (5th Cir. 1992).

In *Salas* the family of a hostage who was shot and killed by the man who held her hostage filed a section 1983

claim against a sheriff claiming, among other things, that his failure to provide SWAT or hostage negotiation equipment to the sheriff's department caused her death. The Fifth Circuit rejected the claim holding that the constitution does not mandate that law enforcement agencies maintain equipment useful in all foreseeable situations. *Salas*, 980 F.2d at 310. With no constitutional duty to provide SWAT or hostage negotiation equipment, the sheriff's failure to do so was not a denial of due process. *Id.*

The instant case is distinguishable from *Salas* and a duty to equip should be imposed. Plakas had already been taken into police custody, patted down and handcuffed. Plakas was killed by police, not by a third-party. It was reasonably foreseeable that the County would on a regular basis confront suspects who would resist arrest and that in the absence of another choice of weapon, the policeman's gun would be used in the confrontation. In adopting a policy not to equip its officers with nonlethal weapons, the County violated Plakas' constitutional rights.

Implied in the fourth amendment right not to be subject to unreasonable searches and seizures or the fourteenth amendment right to due process of law is the duty to equip police officers with devices designed for nonlethal control of those who refuse to surrender to police. The development of chemical sprays and numerous other devices that allow the capture of a suspect without serious injury has radically changed the assessment of what force is reasonable and necessary to effect a seizure. The shooting of a suspect that might have been justifiable by police when guns were the only weapon manufactured that would prevent injury to police, is no longer reasonable in light of the equipment now manufactured for police departments. The constitution compels police departments to adopt the more humane tools and tactics that are now available. This Court should grant certiorari and impose

a duty on municipal units of government to equip police with at least one nonlethal way of taking an unwilling suspect into custody. Unless this Court imposes a duty to equip, police departments will continue to furnish their officers with only firearms and justice will continue to be meted out with the pull of a trigger.

CONCLUSION

The Petitioner respectfully requests that this Honorable Court grant Petitioner's petition for writ of certiorari to the United States Court of Appeals for the Seventh Circuit, decide the questions presented herein and reverse the judgment of the United States District Court of the Northern District of Indiana and the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

THOMAS E. MCCLURE
Counsel of Record
ROGER C. ELLIOTT
PAUL F. MICHEL
ELLIOTT & McCLURE, P.C.
18 Briarcliff Professional Center
Bourbonnais, Illinois 60914
(815) 935-1117

Attorneys for Petitioner

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 93-1431

JO ANN PLAKAS, Individually and as Administrator of the Estate of KONSTANTINO N. PLAKAS, Deceased,

Plaintiff-Appellant,

v.

JEFFREY DRINSKI, in both his individual and official capacity and NEWTON COUNTY, INDIANA, a municipal unit of government,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Indiana, Hammond Division.
No. 91 C 365—**Rudy Lozano,** *Judge.*

ARGUED NOVEMBER 1, 1993—DECIDED MARCH 21, 1994

Before CUMMINGS and COFFEY, *Circuit Judges,* and ZAGEL, *District Judge.**

ZAGEL, *District Judge.* Konstantino Plakas was shot once and killed by Jeffrey Drinski, a deputy sheriff. The

---

* The Honorable James B. Zagel, District Judge of the United States District Court for the Northern District of Illinois, is sitting by designation.

only witnesses to the shooting were three police officers, Drinski and two others. All of the witnesses testified to an act of self-defense; that Plakas was moving toward Drinski and menacing him with a fireplace poker and that, moments before, Plakas had said to Drinski, "Either you're going to die here or I'm going to die here." Plakas's administrator claimed that the self-defense story was full of holes and that, even if it were not, Drinski and the county which employed him had a constitutional obligation to do more to preserve his life than they did. The district judge disagreed and granted summary judgment. This appeal followed.

The details matter here, so we recite them.

When the police first saw Plakas, at about 9:30 p.m. on February 2, 1991, he was walking along State Road 10 in Newton County, Indiana, not far from the Illinois state line. His car had run off the road and wound up in a deep water-filled ditch. Sergeant Buddy R. King, of the Newton County Sheriff's Department thought the car had rolled over on its top and slid for 150 to 200 feet before rolling upright, striking a tree and coming to rest in the ditch. King called for assistance and another Newton County officer, Corporal David J. Koby, and two paramedics, Glen Cain and Steven Whitt, responded. On the way to the scene of the accident, Cain noticed Plakas walking along State Road 10. Cain approached Plakas and saw that Plakas's clothing was wet from the waist down. Cain stopped and spoke to Plakas who said he was fine except that he was cold. Cain examined Plakas's head and found nothing that required medical treatment. Plakas told Cain he had been the driver of the car in the ditch, and Plakas agreed to get into Cain's car in order to be driven back to the accident scene, now about a mile from where Plakas was found. Cain knew there was an ambulance at that site and that Plakas could be examined more carefully there. Cain smelled alcohol on Plakas's breath and Plakas dozed off as they rode to the place where the car had gone off the road.

When Cain and Plakas arrived, the ambulance driver examined Plakas. Cain told Corporal Koby to check Plakas for intoxication and he told Koby why. Plakas refused medical treatment and signed a written waiver of treatment. Koby spoke to Plakas who had some difficulty communicating the fact that he did not have his driver's license (which he had surrendered as bond for a traffic ticket he received in Illinois). Plakas did agree to go to the Sheriff's Department to be tested for intoxication. Koby frisked Plakas and then handcuffed him, with his hands behind his back.

Plakas complained about being cuffed behind his back. He told Koby that this hurt him because he had burn scars on his chest and thought that if he got in the car, his chest would start to bleed. Koby told Plakas that this manner of cuffing was department policy which he must follow. Koby also thought that he would have a problem with Plakas if he uncuffed him. Koby opened the rear door of his squad car, and Plakas entered the car voluntarily. In Koby's car, the rear door handles are not removed. After a brief interval, Koby got in the car and drove away. As he drove he heard a noise that suggested the rear door was opened. He hit the brakes and heard Plakas hit the screen between the front and rear seats. Then the rear door flew open, and Plakas fled into snow-covered woods.

Koby reported the escape and called for help. King, Koby, Cain and Trooper Lucien Mark Perras of the Indiana State Police responded, as did Deputy Sheriff Jeffrey Drinski.

Plakas ran to the Ailes home located on a private road north of State Road 10. He knew the Aileses, Roy and Joyce; he was engaged to marry their daughter, Rachel. They called Plakas "Dino." Joyce Ailes heard Dino banging against the house; she saw him and opened the door. He fell on his face inside the doorway, his hands still cuffed behind his back. Joyce and Rachel helped him. They noticed that his clothes were wet. Plakas told them

that he had wrecked his car and that his head hurt. Joyce saw no blood, but saw bumps on his head and bruises. He appeared to be blacking out.

Roy Ailes spoke to Plakas, smelled alcohol on his breath, and found him to be upset and insistent that he did nothing wrong. Roy told him that he should not run from the police. Plakas agreed that Roy should talk to the police. Roy went out and found Cain, whom he knew, and reported that Plakas was at the Ailes home and willing to come out. Cain and some officers went to the house. Roy stayed outside to direct other police to his house.

Cain and Koby were the first to enter. Cain saw Plakas push his legs through the circle of his arms, bringing his cuffed hands to the front of his body. Plakas was calm until he saw Cain and Koby. While Cain and the others tried to explain that Cain was from the fire department and wanted only to give medical aid, Plakas was loud and combative; (Joyce Ailes said he was "hysterical"). Plakas accused Koby of hurting him, and yelled about the handcuffing behind his back and about his scar tissue. He swore Koby would not touch him. Koby sought to reassure Plakas that he was not there to hurt him. Koby gestured for Cain to back up.

Plakas backed into a corner and neared a set of fireplace tools. He picked one of them up, a 2-3 foot poker with a hook on its end. Then gripping it with both hands, he continued screaming, louder and louder at Cain and Koby. Finally he rushed at Koby and swung quite hard at Koby, striking Koby's wrist with the poker. Koby moved away and tried to come in the room from another door, but Plakas chased him away, swinging the poker. Deputy Drinski passed by the injured Koby and asked him with what he was hit; Koby told him that Plakas had a poker. Inside the house, Plakas took the poker, slammed it into

the wall[1] and then beat his head against the wall. Cain left.

Having driven Koby and Cain from the house, Plakas walked out of the front door. Drinski and Perras had entered the house from the garage and saw Plakas leave. They followed him out, now with guns drawn. Roy Ailes, who had just returned to his house, saw the officers with guns drawn and ran forward saying, "Don't shoot, I'll talk to him." Roy tried to talk Plakas into surrendering. As he did so, Plakas slowly backed down a hill in the yard. The officers told Plakas to drop the poker. At one point, Plakas lowered the poker but did not lay it down. He raised or cocked the poker but did not swing it. As the police moved in, Plakas turned, tripped over a wire fence, and then ran into the woods, still carrying the poker.

The police gave chase, shouting, "Stop, Police." The moon was bright, light was reflecting off the snow and it was easy to track Plakas who slowed as he entered a row of thick brush hedges. Through an opening in the brush was a clearing. Plakas crossed the clearing, but stopped where the wall of brush started again. Perras and Drinski entered the clearing. Sergeant King stood just outside it. Plakas turned and faced them. The clearing was small, but Plakas and the officers were ten feet apart. Drinski blocked the opening in the brush where all had entered the clearing.

For the next quarter-hour or half-hour, Drinski and Perras tried to talk Plakas into surrendering. At times Plakas moved the poker about; at times it rested against the ground. Drinski did most of the talking. His theme was that there were people, including his girlfriend at the house, who cared about Plakas and that nobody needs to get hurt. He also told Plakas to drop the weapon and get

---

[1] We adopt the version most favorable to plaintiff. Cain said that Plakas was not slamming the poker into the wall, rather, he was starting toward Cain and perhaps swinging it at Cain and missing. Cain thought Plakas was out to kill him.

down on the ground. They talked about the handcuffs and the chest scars. Plakas opened his shirt to show the scars to Drinski. King, listening from outside the clearing, thought Drinski might persuade Plakas to drop the weapon, but he did not. Drinski did not believe that Plakas was ever ready to surrender, although he was calmer for a time.

At one point Plakas pointed the poker at Drinski and said, "Either you're going to die here or I'm going to die here." He also said, in substance, "Go ahead and shoot. My life isn't worth anything." Plakas often repeated these thoughts. Then Plakas tried to break through the brush. He turned back to Drinski who was 12 to 15 feet away and, with the poker raised, charged at Drinski who backed away. Drinski's retreat was involuntarily stopped, either by his backing into a tree or by a near stumble of some sort. Drinski believed he couldn't retreat because there was something behind him. He saw Plakas cock the poker over his head for a swing and, when Plakas was two arms lengths away, he fired once at Plakas' chest. The shot hit Plakas in the chest inflicting a mortal wound. After he was shot, Plakas fell to Drinski's right and lay face down semiconscious on the ground. Perras took the poker. Plakas was turned on his back. The handcuffs were removed. Plakas remained semiconscious until medical assistance arrived. He moaned and said, "I'm dying." Since medical assistance previously had been requested for Koby, it was not long in coming. When paramedic Whitt arrived at the clearing, he found Plakas laying about a foot from the brush at one corner of the clearing. Plakas died sometime after he arrived at the hospital.

Drinski was in fear of his life, and Plakas's action was sudden and unexpected. Perras would have shot Plakas if Drinski had not. During the entire time in the clearing, Perras had a canister of CS repellant on his belt.[2] It could

[2] Perras said that he did not use the CS repellant because he was too far from Plakas and because it might have landed on his fellow officers. Whatever the facts may be, it is hard to attribute to either Drinski or Newton County the inaction of Perras, who is neither a defendant here nor under the command of Newton County.

have been used to disable Plakas. Moreover, about ten minutes before the shooting, the services of a canine unit (from Lake County) were offered. The police could have tried to put barriers between themselves and Plakas and maintain distance from him.

This is not a case where an officer claims to have used deadly force to prevent an escape. It is a self-defense case where the officer has "probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer" and, therefore, the officer may use deadly force. *Tennessee v. Garner*, 471 U.S. 1, 3 (1985). *See also Graham v. Connor*, 490 U.S. 386, 396 (1989). Indeed, had Drinski been a private citizen, he would have been entitled to claim self-defense under Indiana law (which does not have a rule of retreat). *French v. State*, 403 N.E.2d 821, 823, 825 (Ind. 1980); *Montague v. State*, 360 N.E.2d 181, 188-89 (Ind. 1977).

Drinski was faced with a man who had, minutes before, attacked a police officer with a dangerous weapon, had refused several entreaties to disarm, had told the officer that one of the two would die that night, and then had moved toward the officer while raising his weapon to strike. Shooting a man who has told you, in effect, that he is going to use deadly force against you and then moves toward you as if to do so is unquestionably an act of self-defense even if, as Plakas's expert maintains, the man is attempting "suicide by police."

Plakas argues there is enough evidence to cast doubt on the defendants' self-defense claim, given the low threshold that courts have set for refuting self-defense in deadly force cases both civil and criminal. The award of summary judgment to the defense in deadly force cases may be made only with particular care where the officer defendant is the only witness left alive to testify. In any self-defense case, a defendant knows that the only person likely to contradict him or her is beyond reach. So a court must undertake a fairly critical assessment of the forensic evidence, the officer's original reports or statements

and the opinions of experts to decide whether the officer's testimony could reasonably be rejected at a trial.

This guiding principle does not fit well here. There is a witness who corroborates the defendant officer's version. And there is no reason to discount the testimony of Trooper Perras; he is neither a defendant himself nor employed by the defendant Newton County. Even if there were no other witness, there is virtually nothing in this record to impeach Drinski. Plakas brings up a few bits of evidence to do so. First, according to Drinski, Plakas charged away from the brush at Drinski, yet one paramedic who was summoned to the clearing to administer to Plakas observed that Plakas's feet were about a foot from the brush. This does not help Plakas's case because, by the time the paramedic arrived, Plakas's body had been moved, rolled over by Drinski and Perras.[3] Plakas himself may have also moved; the dying man kicked over the paramedic's medical case.

Second, Drinski said he was stopped in his retreat by a tree. Perras only saw that Drinski stumbled in his retreat either because he backed into something or simply tripped. The fact remains that both officers say that Drinski's retreat occurred and that it ended by virtue of some circumstance other than Drinski's volition. Further, says Plakas, a photograph of the clearing shows there was no

---

[3] The record before us leaves only room for speculation about some circumstances. We do not know whether there was any forensic investigation made at the scene. We know the caliber of the bullet, but not its type or weight or the power of the charge in the cartridge, nor do we know where it struck Plakas and what effect it might have on the position of the body. *See* Martin L. Fackler, M.D., *Police Handgun Ammunition Selection*, WOUND BALLISTICS REVIEW, Fall 1992, at 32-37 (suggesting little effect beyond stopping movement). Because these facts are not in the record, we cannot consider them on appeal and assume that had they any significance, they would have been made part of the record. Circuit Rule 28(d); *Branion v. Gramly*, 855 F.2d 1256, 1260-61 (7th Cir. 1988).

tree there to stop Drinski, just a sapling, and there are no footprints corroborating Drinski's story of retreat. Actually, the photograph is not included in the record here. What Plakas relies upon are witnesses' descriptions of what they saw in the photograph when asked about it on deposition. There is no showing that any footprints could be clearly discerned in the photograph. In any event, Drinski did not say he was stopped by running into a tree, he said it felt as though he ran into a tree and there is nothing in the record to contradict this testimony other than counsel's speculation that an officer who backs into a sapling would not reasonably believe a tree was at his back. The tree-sapling discrepancy is of the sort on which popular conspiracy theories are built, but it is not enough to allow a rational trier of fact to decide against Drinski. *See Perfetti v. First Nat'l Bank of Chicago*, 950 F.2d 449, 456 (7th Cir. 1991); *Tom v. Voida*, 963 F.2d 952, 961 (7th Cir. 1992).

Perhaps in recognition of this weakness in the case, Plakas offers two other theories, one of which is a minor theme of his brief, that shooting in self-defense is unjustified where the aggressor acted out of reasonable fear of police brutality. *See Gilmere v. City of Atlanta*, 774 F.2d 1495, 1501 (11th Cir. 1985) (*en banc*). Perhaps we ought not to consider this theory since it was not pled, but it is of no use to Plakas in any event.

This theory is founded on the fact that Plakas told Koby, "You hurt me," and on Joyce Ailes's observation that Plakas had facial injuries. From this, Plakas argues a jury could infer that Officer Koby had beaten Plakas. This inference, however, cannot reasonably be made. Leaving aside the absence of evidence of facial injuries from medical records or post-mortem observation, we accept that Mrs. Ailes saw these injuries. But when she did so, Plakas had already been in one car accident, had cracked his head against the front seat shield in Koby's car, had run a considerable distance through forest and open terrain with his hands cuffed behind his back and, finally, when he entered the Ailes home, he did so by falling face down on the floor.

Moreover, when Plakas did say anything at all about Koby, it was a complaint about cuffing him behind his back, which he said (without medical corroboration even now) caused pain because of his scar tissue. Plakas yelled a lot at Koby. It is significant he never yelled about a beating.

Even if Koby did beat Plakas, Koby was not at the scene of Plakas's demise. The officers who confronted Plakas were not the officers who injured him and should be able to claim self-defense. The proposition that an officer who beats John Doe may not use self-defense to justify killing Doe, who later attacks him, rests on the idea that because the officer's wrongful acts caused the attack, he cannot take advantage of his fear of retaliation to defend against liability. *See Gilmere*, 774 F.2d at 1501 ("any fear on the officer's part was the fear of retaliation against his own unjustified physical abuse").[4] Drinski did not cause Plakas to attack him. He can claim self-defense to shooting Plakas.

Finally, there is the argument most strongly urged by Plakas. Even if Plakas attacked Drinski and Drinski acted in self-defense, Plakas was still wronged because Drinski had a duty to use alternative methods short of deadly force to resolve the situation before him. Taken literally the argument fails because Drinski did use alternative methods. He tried for quite a while to get Plakas to lay down the poker and surrender and even attempted to retreat as Plakas charged him. Plakas means to argue that Drinski should have used *all* available alternatives before deadly force was exercised and that Newton County, Drinski's employer, is liable because it failed to equip and train Drinski to use such methods.

The alternatives here were three. The police could have continued to maintain distance from Plakas and keep some form of barrier (like the row of hedges) between him and

---

[4] Here we distinguish *Gilmere*, but by doing so we neither approve nor disapprove of its holding.

them. They could have used disabling chemical spray, or they could have used a dog to disarm Plakas. It is unusual to hear a lawyer argue that the police ought to have caused a dog to attack his client, but he is right that such an attack *might* have led to a better result for his client (and would, in our view, have led to a different sort of lawsuit). Plakas also correctly refrains from arguing that the police should have simply walked away and arrested Plakas on another day.

There is no precedent in this Circuit (or any other) which says that the Constitution requires law enforcement officers to use all feasible alternatives to avoid a situation where deadly force can justifiably be used.[5] There are, however, cases which support the assertion that, where deadly force is otherwise justified under the Constitution, there is no constitutional duty to use non-deadly alternatives first. In *Ford v. Childers*, 855 F.2d 1271 (7th Cir. 1988) (*en banc*), police officers shot and wounded a masked bank robber fleeing from the scene of his crime. Twice the police called out, "Halt, police," but the plaintiff may not have heard. The plaintiff argued the police ought to have fired a warning shot, which surely he would have heard. We said, "[T]he officers' split second decision to use their weapons, after twice warning the suspect, was objectively reasonable under the circumstances. We refuse to impose as an additional constitutional requirement the firing of a warning shot before deadly force may be used." *Id.* at 1276, n.8. Also, in *Carter v. Buscher*, 973 F.2d 1328 (7th Cir. 1992), it was claimed that the police had so poorly planned an arrest that the chance of a deadly gunfight was increased rather than minimized. An alternative plan could have reduced or eliminated the possibility of the arrestee's use of a gun. In *Carter*, such an alternative was not merely speculative; the arrestee was employed

---

[5] There may be state law rules which require retreat, but these do not impose constitutional duties. *See Reed v. Hoy*, 909 F.2d 324, 330-31 (9th Cir. 1989).

inside a prison where he would not have had a gun on his person. Yet we rejected the proposition "that the Fourth Amendment prohibits creating unreasonably dangerous circumstances in which to effect a legal arrest of a suspect." *Id.* at 1332. These cases make it clear that liability cannot be founded on the failure of Drinski to keep some sort of distance or natural barrier between himself and Plakas.

The Fourth Amendment does not require officers to use the least intrusive or even less intrusive alternatives in ordering search and seizure cases. The only test is whether what the police officers actually did was reasonable. *Illinois v. Lafayette*, 462 U.S. 640, 647 (1983); *United States v. Martinez-Fuerte*, 428 U.S. 543, 556-57 n.12 (1976). We do not believe the Fourth Amendment requires the use of the least or even a less deadly alternative so long as the use of deadly force is reasonable under *Garner v. Tennessee* and *Graham v. Connor, supra.*

But Plakas does have at least one opinion on which he may build his argument, that is, *Tom v. Voida*, 963 F.2d 952 (7th Cir. 1992), a case of tragic dimension where an officer stopped to help a fallen man and eventually, as two courts held, had to kill that man in defense of her own life. In brief, after the officer stopped to help the man, his actions and his flight showed he was unhurt and may well have stolen the bike from which he fell. She chased him and, when she caught him, he attacked her, banging her head into a concrete surface. He fled but she caught him. Again, he struck her. It became clear she could not physically subdue him. She did not have her night stick. She had no idea if other officers would arrive. She decided she would have to pull her weapon so that he would not get it. After the weapon was out, she told him three times, "Please don't make me shoot you." He moved toward her. She fired and missed. He stopped, then lunged again; she fired into his chest. In affirming summary judgment for the officer, we said,

> Voida could not have subdued Tom through lesser means, as she did not have her nightstick with her and she feared that reaching for her chemical repellant would expose her weapon to Tom's grasp. Voida fired one shot at Tom which did not hit him, but he insisted on lunging at her again. Voida was justified in concluding that Tom could not have been subdued except through gunfire.

Id. at 962.

It is obvious that we said Voida thought she had no alternatives. But did we hold that this imposes a constitutional duty to use (or at least consider) the use of all alternatives?

The answer is no. *Tom v. Voida* did not, and did not mean to, announce a new doctrine. Nearly every court has commented on that fact that all decisions about deadly force (or any force) "must embody allowance for the fact that police officers are often forced to make split second judgments—in circumstances that are tense, uncertain and rapidly evolving." *Graham*, 490 U.S. at 396-97; *see also Sherrod v. Berry*, 856 F.2d 802, 806-07 (7th Cir. 1988) (*en banc*). We always judge a decision made, as Drinski's was, in an instant or two. It is true we consider the whole of the event as it appears to the officer involved, but we recognize that the decision to shoot can only be made after the briefest reflection, so brief that "reflection" is the wrong word. As Plakas moved toward Drinski, was he supposed to think of an attack dog, of Perras's CS gas, of how fast he could run backwards? Our answer is, and has been, no because there is too little time for the officer to do so and too much opportunity to second-guess that officer.

In *Tom v. Voida* we were not addressing Officer Voida's decision to shoot; we were addressing her decision to draw her firearm and, even there, we spoke of a decision process that was quick and simple. Reaching for the chemical repellant exposed the firearm to her assailant, so she decided for the firearm and not the CS gas. This is not the

kind of weighing of least deadly alternatives that Plakas would have us require of Drinski. What Drinski did here is no different than what Voida did. He tried to avoid violence. Then, when he thought his retreat would not be successful, he was justified in concluding that Plakas could not be subdued at that moment except through gunfire.

Our historical emphasis on the shortness of the legally relevant time period is not accidental. The time-frame is a crucial aspect of excessive force cases. Other than random attacks, all such cases begin with the decision of a police officer to do something, to help, to arrest, to inquire. If the officer had decided to do nothing, then no force would have been used. In this sense, the police officer always causes the trouble. But it is trouble which the police officer is sworn to cause, which society pays him to cause and which, if kept within constitutional limits, society praises the officer for causing.

So we carve up the incident into segments and judge each on its own terms to see if the officer was reasonable at each stage. *Tom v. Voida* is a classic example of this analysis. Here it is beyond dispute that, under the Constitution, the police could reasonably (1) arrest Plakas for drunk driving after he exhibited familiar signs of intoxication; (2) track down an escaping arrestee; (3) draw and point weapons after Plakas armed himself and attacked an officer; (4) pursue Plakas into the clearing after he committed a violent offense and was a danger to himself; and (5) try to talk Plakas into disarming himself and surrendering. All of this means Drinski was properly standing in the clearing, gun in hand, several feet away from Plakas, who charged him with the poker raised. It is from that point on that we judge the reasonableness of the use of deadly force in light of all that the officer knew. We do not return to the prior segments of the event and, in light of hindsight, reconsider whether the prior police decisions were correct. Reconsideration will nearly always reveal that something different could have been done if the officer knew the future before it occurred. This is what we mean when we say we refuse to second-guess the officer.

Here we agree that the undisputed facts can lead to but one conclusion, that Drinski's use of deadly force was reasonable given Plakas's act of aggression and Drinski's knowledge of what had gone on before.

Since Drinski did not violate Plakas's rights, there usually is no basis for holding his employer, Newton County, liable. *Tom*, 963 F.2d at 962. Yet there exists a possibility that although Drinski's acts were justified given his circumstances, Newton County may be held liable for creating those circumstances. Plakas implicitly argues that although Drinski's choice among available alternatives was reasonable, he should have had more choices, *i.e.*, a trained canine, a canister of gas.[6] Plakas implicitly seeks to hold Newton County liable for not providing those choices.

There is, however, not a single precedent which holds that a governmental unit has a constitutional duty to supply particular forms of equipment to police officers. And, in fact, the Fifth Circuit has held that the Constitution "does not mandate that law enforcement agencies maintain equipment useful in all foreseeable situations." *Salas v. Carpenter*, 980 F.2d 299, 310 (5th Cir. 1992). Indeed, Plakas merely states this theory, he does not argue it. Nor does he show how such a rule of liability could be applied with reasonable limits. We do not think it is wise policy to permit every jury in these cases to hear expert testimony that an arrestee would have been uninjured if only the police had been able to use disabling gas or a capture net or a taser (or even a larger number of police officers) and then decide that a municipality is liable because it failed to buy this equipment (or increase its police

---

[6] There are a wide variety of devices available for non-lethal control of those who refuse to surrender, including tasers, capture nets, sticky foam, rubber bullets, and beanbag projectiles. *See, e.g.*, John Barry & Tom Morganthau, *Soon, 'Phasers on Stun'*, NEWSWEEK, Feb. 7, 1994, at 24-26. None of these devices is unfailingly effective and safe, and courts and juries are unlikely to be capable of judging when they ought to be used.

force). There can be reasonable debates about whether the Constitution also enacts a code of criminal procedure, but we think it is clear that the Constitution does not enact a police administrator's equipment list.[7] We decline to use this case to impose constitutional equipment requirements on the police.[8]

The district court's grant of summary judgment is AFFIRMED.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

---

[7] The closest thing we have to such a list is the rule which requires prison administrators to provide a law library to inmates, but even here we only require this as an alternative to providing other forms of legal assistance. And, of course, judges are far more competent to say what equipment is needed to prepare a lawsuit than they are to say what equipment is best to defend one's self against an attack by a man with a poker.

[8] Likewise, we decline to impose a constitutional requirement to train the police to use all available equipment beyond the acceptable training program already mandated. In this record, there is expert opinion that Drinski might have been better trained to negotiate with Plakas and that he may have said one thing to Plakas that he ought not to have said, *i.e.*, that Plakas could hit Drinski with the poker as long as it was not in the head. Plakas, however, merely mentions this testimony to show that Drinski was badly trained. There is no contention that this "invitation" immediately preceded the shooting or caused Plakas to charge Drinski. The only argument in this case is that Plakas did not charge at all.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

JUDGMENT – WITH ORAL ARGUMENT

Date: March 21, 1994

BEFORE:

Honorable WALTER J. CUMMINGS, Circuit Judge
Honorable JOHN L. COFFEY, Circuit Judge
Honorable JAMES B. ZAGEL, District Judge*

No. 93-1431

JO ANN PLAKAS, individually and as administrator of the ESTATE OF KONSTANTINO N. PLAKAS, deceased,

Plaintiff-Appellant

v.

JEFFREY DRINSKI, in both his individual and official capacity and NEWTON COUNTY, INDIANA, a municipal unit of government,

Defendants-Appellees

Appeal from the United States District Court
for the Northern District of Indiana, Hammond Division
No. 91 C 365, Rudy Lozano, Judge

The judgment of the District Court is AFFIRMED, with costs, in accordance with the decision of this court entered on this date.

---

* The Honorable James B. Zagel, District Judge of the United States District Court for the Northern District of Illinois, is sitting by designation.

APPENDIX B

[Filed January 15, 1993]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

Civil No. H91-365

JO ANN PLAKAS, individually and as Administrator of the Estate of KONSTANTINO N. PLAKAS, deceased,

Plaintiffs,

vs.

JEFFREY DRINSKI, in both his individual and official capacity and NEWTON COUNTY, INDIANA, a municipal unit of government,

Defendants.

ORDER

This matter is before the Court on Motion for Summary Judgment, filed August 24, 1992, by Defendant, Jeffrey Drinski ("Drinski"), and Motion for Summary Judgment, filed October 21, 1992, by Defendant, Newton County, Indiana ("Newton County"). For the reasons set forth herein, Drinski's Motion for Summary Judgment is GRANTED, and Newton County's Motion for Summary Judgment is GRANTED.

BACKGROUND

Plaintiff Jo Ann Plakas ("Plaintiff"), individually and as Administratrix of the Estate of Konstantino N. Plakas

("Plakas"), purportedly states claims under 42 U.S.C. § 1983 against Newton County and Drinski, one of its police officers. Drinski's Motion for Summary Judgment argues that as a matter of law, he did not violate the Fourth or Fourteenth Amendment rights of Plaintiff or Plakas and there is no genuine issue of material fact as to the reasonableness of the force Drinski used against Plakas. Alternatively, Drinski argues that he is entitled to qualified immunity. Newton County argues that it is entitled to summary judgment on the ground that there is no constitutional violation. Alternatively, Newton County argues that as a matter of law Drinski was adequately trained in the lawful use of a firearm and in the use of deadly force.

The facts in this case are either undisputed, or are those presented by the Plaintiff, the nonmovant. The facts are derived from the numerous depositions and affidavits in this case.[1]

---

[1] In her response to Drinski's Motion for Summary Judgment, Plaintiff argues that the Indiana Dead Man's Statute, Ind. Code Ann. § 34-1-14-6 (West 1983), bars Drinski and fellow officers, Buddy King, David Koby, and other deputies, officers, and employees of Newton County, Indiana from testifying to any statements or occurrences which took place in the presence of the decedent, Plakas.

Rule 601 of the Federal Rules of Evidence provides that, "in all civil actions and proceedings, with respect to element of claim or defense as to which state law applies the rule of decision, the competency of a witness shall be determined in accordance with state law." Fed. R. Evid. 601. Counts One and Two of Plaintiff's Complaint are brought pursuant to 42 U.S.C. § 1983, alleging violation of Plakas' rights under the Fourth and Fourteenth Amendments to the United States Constitution. As both Counts One and Two are wholly founded in federal law, Plaintiff's reliance on the Indiana Dead Man's Statute is completely misplaced and wholly inappropriate. The plain and obvious language of Rule 601 states that "every person is competent to be a witness" except where

(Footnote continued on following page)

On Saturday, February 2, 1991, at about 11 p.m., Plakas was fatally shot by Newton County Deputy Sheriff Jeffrey Drinski. The events which led to this shooting are as follows: Around 9:30 p.m. that night two Newton County Deputy Sheriffs, Corporal David Koby and Sergeant Buddy King, as well as Lake Township Volunteer Fire Department members, Glenn Cain and Stephen Whitt, responded to a call regarding an auto accident on State Road 10. Upon arriving at the scene, the men found Plakas' car in a deep ditch filled with water. The car left the north side of the road and came to rest in the ditch.

Cain found Plakas walking along State Road 10 and stopped to speak with him. Plakas stated that he was the driver of the car found in the ditch, and that he was fine, except that he was cold. Plakas was not injured and was not in need of medical treatment. However, he got in Cain's vehicle and rode west about one mile to the accident scene.

At the scene of the accident, Cain told Officer Koby to check Plakas for intoxication since he could smell alcohol on Plakas' breath and Plakas was dozing off. Plakas signed a waiver of medical treatment after being examined by the Newton County Ambulance Service, and told Koby he would go to the Sheriff's Department for a breatha-

---

[1] *continued*
state law supplies the rule of decision, the competency of a witness will be determined in accordance with state law. Fed. R. Evid. 601. As no Indiana law supplies any rule of decision in this matter, the Indiana Dead Man's Statute does not apply, and Drinski, as well as other officers, deputies and employees of Newton County are competent to testify in this matter. *See e.g. Sundstrand Corp. v. Sun Chemical Corp.*, 553 F.2d 1033, 1051 (7th Cir.), *cert. denied*, 433 U.S. 875 (1977); *Donaldson v. Hovanec*, 473 F. Supp. 602, 610 (E.D. Pa. 1979).

lyzer test. Koby patted down Plakas, then handcuffed him behind his back, and directed him to get into the rear of the squad car to be transported to the county jail for a breathalyzer test. Plakas claimed that being cuffed behind the back would injure his chest, which had extensive scar tissue from a childhood burn. Koby cuffed Plakas behind the back, ignoring his request to be cuffed in front.

As Koby drove towards the jail he heard a noise from the back seat as if one of the car doors had opened. Fearing that Plakas would jump out of the car as it was moving, Koby pulled his squad car off the road and stopped. The back door flew open and Plakas jumped out and started running across a field. Koby radioed that Plakas had escaped from Koby's vehicle two to four miles east of the accident site. The message was heard by Cain and Whitt of the fire department, King and Drinski of the Sheriff's office, and State Trooper Lucien Perras. Cain arrived at the scene and helped Koby search for Plakas in a field north of State Road 10.

Roy and Joyce Ailes lived in a house at the end of a long driveway to the north of State Road 10. Plakas had been dating their daughter, Rachael Ailes, for about four years, and they were engaged to be married. On February 2, 1991, at around 10 p.m., Plakas arrived on the doorstep of the Ailes' home. Joyce Ailes opened the door to let Plakas in and he fell through the front door into her living room. Plakas was handcuffed behind the back. Plakas stated that he'd wrecked his car and that he needed help. Joyce Ailes was under the impression that Plakas had multiple lumps to the head and bruises to his legs. It appeared that he was in need of medical attention and was blacking out because of head injuries.

Roy Ailes entered the living room and spoke to Plakas. Plakas kept stating that he didn't do anything wrong.

From his living room, Mr. Ailes could see the lights from the police cars on State Road 10. He told Plakas that he could not run from the police and he would help straighten things out. Plakas agreed that Roy Ailes should go talk to the police. Ailes drove to where the officers were, and advised Cain that Plakas was at his house and was willing to come out to talk to them. Ailes directed the officers to his home. Koby, Drinski, and Cain then drove to Mr. Ailes' home. Cain approached the front door of the house to see if Plakas needed medical treatment. He observed Plakas in the process of sliding his arms beneath his buttocks and legs in order to bring his handcuffs in front of him. Cain entered through the front door with Koby behind him. Drinski went to watch the back door of the house.

As soon as Cain and Koby entered the house, Plakas began screaming. He was standing in a corner of the Ailes' living room with his hands now cuffed in front of him. Plakas' demeanor went from calm to upset at the sight of the uniformed fireman and police officer. When Koby entered the house the tension escalated and Plakas began shouting, screaming, and swearing that Koby had hurt him and that Koby would not touch him. Plakas then backed into the corner of the living room and as he backed up he bumped the fireplace tools, reached down and picked up the poker. The fireplace poker was two to three feet long with a hook on the end. Plakas gripped it like a baseball bat as he screamed at Cain and Koby. Several minutes after Plakas picked up the poker he rushed at Officer Koby and swung the poker like an axe at Officer Koby's head. Officer Koby threw his left hand up to protect his head and Plakas hit him on the wrist with the poker. Officer Koby fell into the door and ran out of the house. Officer Koby never drew his gun while in the house.

Plakas then chased Cain with the poker. Cain ran up through a stairway two or three stairs into the kitchen to avoid also being hit with the poker. To avoid Plakas, Cain ran through the house and out into the garage. Having heard the scuffle, Drinski came around to the front of the house and around the same time, Sergeant King and Trooper Perras arrived on the scene. Drinski and Perras then entered the house through the garage door with their guns drawn. As they entered, they saw Plakas run out of the front door of the house. Plakas stopped in the yard after running out of the house. The police officers drew their guns and Mr. Ailes jumped between the police officers and Plakas. Ailes tried to get Plakas to put the poker down and surrender. As Ailes talked to Plakas, Plakas slowly backed down a hill in the Ailes' yard. For a moment it seemed that he might put down the poker and surrender. However, as police moved in behind Mr. Ailes, Plakas turned, tripped over a wire fence, and ran to the north through a nearby open field with Officers King and Drinski, as well as State Trooper Perras in pursuit. The police officers continued to yell, "Stop, police." Plakas was still cuffed in front, palm to back of hand, holding the fireplace poker. The officers had no trouble keeping up with Plakas. It was a clear night, the moon was bright, the snow on the ground further illuminated the field, and the officers had no problem seeing Plakas.

As Plakas entered some thick brush, he slowed down. The officers had their guns drawn and their flashlights trained on Plakas. After moving through the brush, Plakas entered a clearing. Drinski and Perras followed Plakas into the clearing, maintaining a distance of at least ten feet from him, while King stayed on the outside of the brush. Plakas crossed the clearing and stopped and faced the officers when he reached the heavy brush on the far east

side. For the next several minutes, the officers kept their distance and tried to convince Plakas to surrender. Plakas attempted to break through the brush behind him and leave the clearing, but the brush was too thick. The officers continued to talk to Plakas, telling him that he should surrender and that he would get himself in more trouble if he didn't. Plakas stated that his life wasn't worth living and that he was going to kill both officers, or they would have to kill him. He carried the poker like a baseball bat in front of him, moving it around some. At all times, Drinski was directly in front of Plakas, and Perras remained five to seven feet to the left of Drinski. The officers continued to talk to Plakas for a few minutes, but were unable to calm him down. Again, Plakas stated that his life wasn't worth living, and that the officers would have to kill him, or he would attempt to kill them both. He then raised the poker like a baseball bat and lunged toward Drinski. Drinski took a step back, and nearly fell down as he fired a single shot which struck Plakas mid-chest. Plakas subsequently died of this wound.

Plakas' mother, the Administratrix of his estate, has filed suit under 42 U.S.C. § 1983 against Drinski and Newton County to recover damages in connection with her son's death. She alleges that her son was armed with only a fireplace poker and posed no serious threat to the safety of Drinski or others. She alleges that Drinski and Newton County violated her son's rights under the Fourth and Fourteenth Amendments, "to be secure in his person, to be free from the use of deadly force, to be free from punishment without due process of law, and to equal protection of the laws." (Plaintiff's Amended Complaint at ¶ 14) She also claims that her own rights to parenthood and association under the Fourteenth Amendment, were infringed. (Plaintiff's Amended Complaint at ¶ 15)

DISCUSSION

Pursuant to Rule 56 of the Federal Rules of Civil Procedure, summary judgment is proper only if it is demonstrated that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986); *First Wis. Trust Co. v. Schroud*, 916 F.2d 394, 398 (7th Cir. 1990). In other words, the record must reveal that no reasonable jury could find for the nonmovant. *Karazanos v. Navistar Int'l Transp. Corp.*, 948 F.2d 332, 335 (7th Cir. 1991); see also *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986). In deciding a motion for summary judgment, the Court must read all facts in the light most favorable to the nonmoving party. *Anderson*, 477 U.S. at 255; *Richardson v. Penfold*, 839 F.2d 392, 394 (7th Cir. 1988).

The burden is upon the moving party to identify those portions of "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits," if any, which it believes demonstrates an absence of a genuine issue of material fact. *Celotex*, 477 U.S. at 323. Once the moving party has met this burden, the nonmoving party may not rest upon mere allegations but "must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e); *Becker v. Tanenbaum-Hill Assoc., Inc.*, 914 F.2d 107, 110 (7th Cir. 1990); *Schroeder v. Lufthansa German Airlines*, 875 F.2d 613, 620 (7th Cir. 1989). "Whether a fact is material depends on the substantive law underlying a particular claim and only disputes over facts that *might effect the outcome* of the suit under governing law will properly preclude the entry of summary judgment.' " *Walter v. Fiorenzo*, 840 F.2d 427, 434 (7th Cir. 1988) (citing *Anderson*, 477 U.S. at 250-252)).

"[A] party who bears the burden of proof on a particular issue may not rest on its pleading, but must affirmatively demonstrate, by specific factual allegations, that there is a *genuine* issue of material fact which requires trial." *Beard v. Whitley County REMC*, 840 F.2d 405, 410 (7th Cir. 1988). Therefore, if a party fails to establish the existence of an essential element of its case on which it bears the burden of proof at trial, summary judgment will be appropriate. In this situation, there can be " 'no genuine issue as to any material fact', since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." *Celotex*, 477 U.S. at 324 (1986).

Drinski's Motion for Summary Judgment

Drinski first argues that he is entitled to summary judgment because a reasonable jury could reach only one conclusion, based upon the evidence, that a reasonable police officer at the scene would have acted as Drinski did. He contends, therefore, that a trial would be useless.

The United States Supreme Court in *Graham v. Connor*, 490 U.S. 386 (1989), held that claims of excessive force in the course of arrest or other seizure must be analyzed under the Fourth Amendment's "objective reasonableness" standard. The Court looks to "whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation." *Id.* at 397; *McDonald v. Haskins*, 966 F.2d 292, 293 (7th Cir. 1992).

The use of deadly force will be deemed objectively reasonable "where the officer has probable cause to believe the suspect poses a threat of serious physical harm, either to the officer or to others." *Tennessee v. Garner*, 471 U.S.

1, 11 (1985). "Thus, if the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm, deadly force may be used if necessary to prevent escape, and if, where feasible, some warning has been given." *Id.* at 11-12. The existence of probable cause is a question for the jury only "if there is room for a difference of opinion." *Ford v. Childers*, 855 F.2d 1271, 1275 (7th Cir. 1988). Additionally, it is imperative that in determining the reasonableness of the officer's conduct, the focus is on the very moment when the officer makes the "split second judgments", *Graham v. Connor*, 490 U.S. at 397, which led to the use of deadly force:

> The "reasonableness" of a particular use of force must be judged from the prospective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight. . . . The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation.

Id. (citations omitted).

In *Ford v. Childers*, 855 F.2d 1271 (7th Cir. 1988), two police officers shot a fleeing bankrobber whom they believed might be armed. The Seventh Circuit affirmed the district court's grant of a directed verdict in favor of the defendant police officers, holding that "a reasonable jury could only conclude that Officer Childers had probable cause to believe that Ford posed a threat of serious physical harm to himself and/or to others." 855 F.2d at 1276. Thus, the court held that the officer's actions under the circumstances were objectively reasonable as a matter of law. *Id.* The court reasoned that although the officer,

at the time he shot Ford, did not know that Ford was armed, given the information that he possessed at the time, and the observations that he made, the officer reasonably concluded that Ford was armed and dangerous. *Id.* at 1275. The court stressed that under the Fourth Amendment, the constitutionality of the officer's action was not judged with hindsight, but only by "an examination and weighing of the information [he] possessed immediately prior to and at the very moment he fired the fatal shot." *Id.* (quoting *Sherrod v. Berry*, 856 F.2d 802, 805 (7th Cir. 1988)).

The Seventh Circuit most recently addressed the use of deadly force to effectuate an arrest in *Carter v. Buscher*, 973 F.2d 1328 (7th Cir. 1992). There, five law enforcement officers concocted a scheme for arresting a man suspected of plotting the murder of his wife. Concerned that the suspect was usually heavily armed, especially in his home, the officers decided they would lure the suspect to a highway roadside, where officers pretending to be stranded motorists would effectuate his arrest. The plan went awry, as one of the impatient officers announced that he was a policeman. The suspect immediately shot and killed one of the officers and fired at least four shots at another officer, who was shot and injured. One of the other officers then shot the suspect in the chest with a single twelve-gauge shotgun slug, which killed him. Acting as the administratrix of his estate, his wife sued the officers, charging that their scheme to arrest him had "provoked a situation whereby unreasonable deadly force was used in the attempt to seize his person in violation of the Fourth Amendment . . . ." *Carter v. Buscher*, 763 F. Supp. 392, 394 (C.D. Ill. 1991). The district court granted summary judgment for the defendants, holding that the use of deadly force was reasonable as a matter of law:

> In the case at bar, there is no question that the police seized Ruhl by the use of deadly force. However, there is also no question that, as a matter of law, the seizure was reasonable. As recognized by *Garner*, the police are authorized to use deadly force to apprehend a felon where they have probable cause to believe the felon poses a risk of serious harm to the officers or others. The state police and corrections officers did not use deadly force until Ruhl had killed agent Bensyl and shot agent McLearin three times. Clearly, they had probable cause to believe that their lives were in danger if they did not return Ruhl's fire.

763 F. Supp. at 396.

The Seventh Circuit affirmed the summary judgment entered below, agreeing that the use of deadly force was unquestionably justified. Furthermore, the court rejected the appellant's contention that the Fourth Amendment prohibits creating a foreseeably dangerous situation in which to arrest a suspect. Simply put, the court held that "pre-seizure conduct is not subject to Fourth Amendment scrutiny." 973 F.2d at 1332. "Even if the defendants concocted a dubious scheme to bring about Ruhl's arrest, it is the arrest itself and not the scheme that must be scrutinized for reasonableness under the Fourth Amendment." *Id.* at 1333.

The undisputed facts in this case are that Plakas was armed with a two to three foot steel rod with a hook on the end of it. He had already assaulted one officer with this weapon. He evaded arrest, fled from the police, and claimed that he would not be taken alive. After speaking to Plakas for almost thirty minutes, Drinski and Perras were unable to calm Plakas or get him to surrender. He claimed that he would kill them both or that they would have to kill him. Finally, Plakas lunged at Drinski

with the fireplace poker in front of him. As a matter of law, there can be no other conclusion but that Plakas threatened Drinski with a weapon intending to inflict serious physical harm. *Garner*, 471 U.S. at 11-12. Under these circumstances, this Court holds that a reasonable jury could only conclude that Drinski had probable cause to believe that Plakas posed a threat of serious physical harm to himself and/or to others. *Ford*, 855 F.2d at 1276. Thus, Drinski's split-second decision to use deadly force to protect himself was objectively reasonable as a matter of law, and under these circumstances there can be no violation of the Fourth or Fourteenth Amendments.

This Court rejects the arguments and intimations made by Plaintiff that Drinski was under a legal obligation to either let Plakas escape, or to effect his arrest by less provocative means. That Trooper Perras had with him a canister of teargas and that a canine unit could have been summoned within thirty minutes, are immaterial to the inquiry of whether the force used to seize Plakas was reasonable. Our jurisprudence does not require this Court to inquire what other means are available to effectuate this seizure. The relevant inquiry is only whether at the time deadly force is used, whether the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or others. *Garner*, 471 U.S. at 11-12. As this remains the test employed by federal courts, all other inquiry is immaterial.

Accordingly, this Court hereby GRANTS Drinski's Motion for Summary Judgment, as Drinski's actions under the circumstances were objectively reasonable as a matter of law.

Newton County's Motion for Summary Judgment

Since this Court holds that Drinski acted reasonably under the circumstances, it follows that Newton County, as his employer, cannot be held liable to Plakas, as its liability was dependent upon the unreasonableness of Drinski's actions. Because Drinski did not violate Plakas' constitutional rights, there is no basis for liability against Newton County. *City of Los Angeles v. Heller*, 475 U.S. 796, 799 (1986) ("If a person has suffered no constitutional injury at the hands of the individual police officer, the fact that department regulations might have authorized the use of constitutionally excessive force is beside the point.") *See also Tom v. Voida*, 963 F.2d 952, 962 (7th Cir. 1992); *Ford v. Childers*, 855 F.2d at 1276-1277.

Accordingly, this Court hereby GRANTS Newton County's Motion for Summary Judgment.

ENTER: 1/16/93

/s/ Rudy Lozano
Rudy Lozano, Judge
United States District Court

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

JUDGMENT IN A CIVIL CASE

Jo Ann Plakas, Individually and as Administrator of the Estate of Konstantino N. Plakas, Deceased

v. Case Number: H91-365

Jeffrey Drinski, in both his individual and official capacity and Newton County, IN a municipal unit of government

---

☐ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒ Decision by Court. This action came before the Court * * * and a decision has been rendered.

IT IS ORDERED AND ADJUDGED That Drinski's and Newton County's Motion for Summary Judgment is Granted.

Date January 20, 1993

GERALDINE J. CROCKETT
Clerk

/s/ IRMA RIVERA
(By) Deputy Clerk

APPENDIX C

CONSTITUTIONAL PROVISIONS AND STATUTES AT ISSUE

The fourth amendment to the Constitution of the United States provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

U.S. Const. amend. IV.

The fourteenth amendment to the Constitution of the United States provides:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

U.S. Const. amend. XIV, sec. 1.

Section 1983 of Title 42 of the United States Code provides:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction there-

of to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

42 U.S.C. §1983 (1991).

(2)

Supreme Court, U.S.
FILED
JUL 12 1994
OFFICE OF THE CLERK

No. 93-2005

In The

Supreme Court of the United States

October Term, 1994

JO ANN PLAKAS, Individually and as Administrator of the Estate of KONSTANTINO N. PLAKAS, Deceased,

Petitioner,

v.

JEFFREY DRINKSKI, in both his individual and official capacity, and NEWTON COUNTY, INDIANA, a municipal unit of government,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

ELIZABETH A. KNIGHT
Counsel of Record
COLLEEN C. COBURN
KNIGHT, HOPPE, FANNING & KNIGHT, LTD.
2860 River Road, Suite 400
Des Plaines, Illinois 60018-6009
(708) 298-8000

Attorneys for Respondents

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

23 pp

QUESTIONS PRESENTED

1) Whether the use of deadly force is reasonable where the officer is responding to a threat of imminent bodily harm or death.

2) Whether the Constitution requires a police officer to exhaust non lethal alternatives as a prerequisite to the use of deadly force.

3) Whether the Constitution requires a police department to supply particular equipment to its officers.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

STATEMENT OF THE CASE 1

ARGUMENTS 3

I.

THE OPINION OF THE SEVENTH CIRCUIT COURT OF APPEALS IS PREMISED UPON A CAREFUL AND DELIBERATE ANALYSIS OF ALL THE EVIDENCE PRESENTED BELOW 3

II.

NEITHER THE DECISION BELOW NOR THE RECORD RAISES THE ISSUES FRAMED BY THE PETITION 10

A. The Lower Court Considered The Totality Of The Circumstances 10

B. Alternative Means To Effect An Arrest Are Irrelevant When The Officer Reasonably Uses Deadly Force In Self Defense 12

C. There Is No Conflict Amongst The Circuits Regarding The Use Of Deadly Force in Self Defense 14

III.

THERE IS NO CONSTITUTIONAL REQUIREMENT FOR A POLICE DEPARTMENT TO SUPPLY PARTICULAR EQUIPMENT TO ITS OFFICERS ... 18

CONCLUSION 19

TABLE OF AUTHORITIES

Page

CASES:

Brower v. County of Inyo, 489 U.S. 593 (1989) 13

Gilmere v. City of Atlanta, 774 F.2d 1495 (11th Cir. 1985) 16, 17, 18

Graham v. Connor, 430 U.S. 386 (1989) 2, 10, 13, 14

Klein v. Ryan, 847 F.2d 368 (7th Cir. 1988) 13

Salas v. Carpenter, 980 F.2d 229, 310 (5th Cir. 1992) 18

Tennessee v. Garner, 471 U.S. 1, 11 (1985) 2, 3, 10, 13

No. 93-2005

In The

Supreme Court of the United States

October Term, 1994

JO ANN PLAKAS, Individually and as Administrator of the Estate of KONSTANTINO N. PLAKAS, Deceased,

Petitioner,

v.

JEFFREY DRINKSKI, in both his individual and official capacity, and NEWTON COUNTY, INDIANA, a municipal unit of government,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

STATEMENT OF THE CASE

On October 15, 1991 Konstantino Plakas, deceased, armed with a fireplace poker overhead, charged at respondent, Jeff Drinski, a deputy sheriff from Newton County, Indiana. In fear for his life, Jeff Drinski fired one shot which fatally wounded Konstantino Plakas.

Petitioner, Jo Ann Plakas, administrator of the Estate of Konstantino Plakas, filed an action pursuant to 42 U.S.C. Section 1983 against respondents, Jeffrey Drinski

and Newton County, Indiana, alleging an unconstitutional use of deadly force. Respondents, Drinski and Newton County filed motions for summary judgment in the district court.

The United States District Court for the Northern District of Indiana granted summary judgment finding that the undisputed facts in the case established that Plakas threatened Drinski with a weapon intending to inflict physical harm. (Pet. App. B-12, 13) The district court applied this Court's opinions in *Tennessee v. Garner*, 471 U.S. 1, 11 (1985) and *Graham v. Connor*, 430 U.S. 386 (1989) in concluding that the use of deadly force was reasonable. (Pet. App. B-9, 10).

Petitioner appealed the dismissal of her case to the Seventh Circuit Court of Appeals which affirmed, also relying on this Court's opinions in *Tennessee v. Garner* and *Graham v. Connor* taking into account that decisions about force must embody allowance for the fact that police officers are often forced to make split second judgments in circumstances that are tense, uncertain and rapidly evolving. *Graham* 490 U.S. 396-97. (Pet. App. A-13).

The plaintiff's petition for writ of certiorari to this Court followed.

REASONS WHY THE PETITION SHOULD BE DENIED

I.

THE OPINION OF THE SEVENTH CIRCUIT COURT OF APPEALS IS PREMISED UPON A CAREFUL AND DELIBERATE ANALYSIS OF ALL THE EVIDENCE PRESENTED BELOW.

A considered review of the opinion below reveals that it necessarily was premised upon a detailed analysis of the facts and circumstances leading up to the attack on Deputy Jeff Drinski by plaintiff's decedent, Konstantino Plakas in accord with this Court's opinion in *Tennessee v. Garner*, 471 U.S. 1, 11 (1985). Respondent adopts the facts set forth in the opinion of the Seventh Circuit and supplements facts set forth by petitioner which are neither complete nor correct.

Petitioner's statement of facts before this Court states that Plakas was shot while Drinski was trying to effect his arrest. (Pet. p. 2). The petition further states that Plakas took a step towards Drinski and Drinski fired his gun. (Pet. p. 10). Petitioner omits the critical fact that Plakas was armed with a fireplace poker and attacking Drinski at the time that one shot was fired. This is a case of self defense. (Pet. App. A-7).

On October 15, 1991 Konstantino Plakas (hereinafter Plakas) was involved in a one car accident having driven off the road into a ditch. (Doc. No. 21, King, p. 3).[1]

---

[1] In addition to deposition testimony, defendants' motion for summary judgment in the district court was supported with the affidavits and statements of material witnesses given to

Paramedic Glen Cain was a volunteer fireman who arrived on the scene and attempted to treat Plakas. (Cain Dep. p.6-7). Cain wanted to take Plakas to the ambulance so that he could check Plakas over. (Cain Dep. p. 8). Plakas refused medical treatment and refused to go with Cain. (Cain Dep. p.12).

Officer David Koby from the Newton Sheriff's Department arrived at the accident scene and he asked Plakas if he was willing to take a test for intoxication and Plakas agreed. (Doc. No. 21, Koby, p.3). Plakas objected to being transported with handcuffs behind him indicating that it would hurt his chest. (Doc. 21, Koby p. 4). Koby thought that he would have problems with Plakas if he uncuffed him. (Doc. No. 21., p. 4).

Koby placed Plakas in the squad car and while the vehicle was moving he heard a noise indicating that Plakas had managed to open the back door. (Doc. 21, Koby p.6). Koby attempted to stop his vehicle and when he hit the brakes he heard Plakas hit the screen between the front and rear seats. (Doc. 21, Koby p.6). The rear door flew open and Plakas bailed out running still handcuffed. (Doc. 21, Koby p. 6).

After Plakas escaped, Newton County called for assistance and Lucien Mark Perras with the Indiana State Police responded (Perras Dep. p. 3). Respondent, Jeff Drinski, a patrol officer for Newton County Sheriff's Department also responded. After escaping, Plakas ran to

---

Indiana State Police Investigator William Krueger shortly after the incident. The statements and affidavits are attached to defendants' statement of uncontested facts, Doc. No. 21.

the home of Roy and Joyce Ailes. (Roy Ailes Dep. p. 5). Mrs. Ailes was home and heard a loud bang against the side of the house. (Joyce Ailes Dep. p. 21). She saw Plakas open the door and he fell in face first with the handcuffs still in place behind his back. (Joyce Ailes Dep. p. 23). He did not use his arms or his legs to block the fall and she did not know if he hit his head when he fell. (Joyce Ailes Dep. p. 24). Plakas told her that he wrecked his car and complained of his head bothering him. (Joyce Ailes Dep. p. 25).

Roy Ailes drove down to the scene of the accident and located firefighter Glen Cain and Officers Drinski and Koby who returned to his home with him. (Cain Dep. p. 20). Cain observed Plakas succeed in getting his legs through the handcuffs and in front of him as Cain entered the Ailes' home. (Cain Dep. p. 21). Plakas was combative when Cain entered the house. (Cain Dep. p. 25).

When Officer Koby entered the room Plakas was screaming at the top of his lungs and wanted to know why he had to be cuffed from the back. (Doc. No. 21 p. 9). Plakas yelled at Officer Koby because he had put him in handcuffs behind the back and it was pulling at scar tissue. (Joyce Ailes Dep. p. 97-98). Plakas never said that Officer Koby had struck him. (Joyce Ailes Dep. p. 99, Roy Ailes Dep. p. 61).

Plakas backed into a corner, grabbed the fireplace poker and got crazy. (Cain Dep. p. 25). He grabbed it with both hands and swung it like a baseball bat or chopping ax. (Cain Dep. p. 26). Officer Koby was trying to calm him down. (Joyce Ailes Dep. p. 51). Plakas attacked Officer

Koby with the fireplace poker who put his arm up over his head to protect his head. (Joyce Ailes Dep. p. 57-58).

After attacking Officer Koby, Plakas chased Glen Cain with the poker. (Cain Dep. p. 29). Cain thought that Plakas was going to kill him. (Cain Dep. p. 29). There were holes in the wall where Plakas swung at Cain. (Cain Dep. p. 29). After Plakas slammed the poker into the wall twice, he beat his head into the corner of the kitchen wall. (Joyce Ailes Dep. p. 64).

Jeff Drinski was at the rear of the house at the time of the attacks inside but heard that an officer had been struck. (Drinski Dep. p. 47). He went to Officer Koby who appeared to be in pain and Koby indicated that he had been struck by a fireplace poker. (Drinski Dep. p. 49).

Thereafter, Drinski and Perras entered the house through the garage and proceeded into the living room. They observed Plakas holding a steel fireplace poker, baseball bat style. (Drinski Dep. p. 51). Plakas again eluded the police and went back into the woods behind the Ailes' home. (Perras Dep. p. 33). With guns drawn, Sergeant King of the Newton County Sheriff's Department, State Trooper Perras and Drinski followed Plakas into the woods. (Drinski Dep. p. 55-56). Sergeant King stayed on the outside of a small opening or clearing in the middle of a thicket while Drinski and Perras followed behind Plakas. (Doc. 21 King p. 9).

Drinski did most of the talking, telling Plakas that there were people who cared about him and telling Plakas that he could walk away from this and nobody needs to get hurt. (Doc. No. 21 King, p. 9).

At one point, Plakas held up the weapon, pointed it at Drinski and said, "Either you're going to die here," pointed at Perras and said, "You're going to die here, or I'm going to die here." (Drinski Dep. p. 74). Moments later Plakas was trying to break through the hedge row to get away and he unexpectedly turned, faced Drinski and charged him. (Drinski Dep. p. 75). Plakas had the weapon in a raised position. (Drinski Dep. p. 75). Before Plakas charged him, Plakas was about twelve to fifteen feet from Drinski. (Drinski Dep. p. 77). As Plakas rushed closer to Drinski, Drinski tried to back up but backed up into something and fired one shot. (Drinski Dep. p. 79-80). Drinski backed up into a small tree but he did not know how tall it was. (Drinski Dep. p. 80). Plakas was within two arm lengths of Drinski and had closed half the distance that had been between them when Drinski fired his weapon. (Drinski Dep. p. 86). Drinski was in fear for his life when he fired the shot. (Drinski Dep. p. 90-91). Drinski was scared that night because he was in the dark woods and trying to bring into custody a person who was acting irrational. Plakas had already demonstrated his ability and his intention to inflict serious bodily injury or possibly death on another uniformed officer and Plakas was trying to do the same thing to Drinski when the shot was fired. (Drinski Dep. p. 96).

Trooper Perras was standing five to seven feet from Jeff Drinski at the time of the attack. (Perras Dep. p. 45). After Plakas said he was going to have to kill them, he raised the poker like a baseball bat and lunged toward Drinski. (Perras Dep. p. 45), Drinski took a step back and nearly fell down and the shot fired. (Perras Dep. p. 45). Plakas started a running take off at Drinski. (Perras Dep.

p. 45). When Plakas lunged at Jeff Drinski it was a sudden and unexpected action on his part. (Perras Dep. p. 111).

It was apparent to Perras that Plakas was going to take their lives. (Perras Dep. p. 105). If Drinski had not discharged his weapon, Perras was prepared to discharge his. (Perras Dep. 106). Based on his observation of the fireplace poker, it was definitely his belief that the poker had the ability to inflict serious bodily injury or death. (Perras Dep. p. 107).

Petitioner misstates the record when she asserts that the plaintiff produced evidence in the district court that Newton County Officer David Koby beat Plakas after Plakas was detained, patted down and handcuffed (Pet. p. 16), and when she states that Plakas was beaten and mistreated by officers of Newton County. (Pet. p. 21). The record in this case is devoid of any evidence that Officer Koby or any other officer beat the decedent.

Petitioner further asserts that Drinski was not adequately trained but failed to set forth his training contained in the record below. Jeff Drinski graduated from high school and went to Indiana University for two years obtaining thirty-three credit hours in Criminal Justice as his major. (Drinski Dep. p. 7-8). He attended the Indiana Law Enforcement Academy in October of 1989 to December of 1989. (Drinski Dep. p. 8). He was certified from the Law Enforcement Academy and also attended numerous seminars thereafter, some of which dealt with the subject of deadly force but not exclusively. (Drinski Dep. p. 10). He had classes at the Academy dealing with deadly force

and was trained through lecture, field exercise and interactive exercise. (Drinski Dep. p. 11). Newton County had training videotapes available for viewing and he watched numerous tapes that covered the subject of deadly force. (Drinski Dep. p. 16-20).

Additionally, petitioner's quotation from the Newton County Department Directive 1.3 dealing with the discharge of a firearm is incomplete. (Pet. p. 3-4). The entire directive addressing the discharge of fireams reads as follows:

III. Discharging Firearms

A. Employees may only discharge firearms in the performance of their regular duties or while acting under official color:

1. For supervised target practices and annual firearms qualifications.

2. When they reasonably believe the action to be in defense of human life:

3. To defend themselves from death or serious injury,

4. To defend another from death or serious injury.

5. To effect the arrest or prevent the escape of a convicted felon or person who has committed or attempted to commit a felony, when other means are insufficient and when they have absolute belief that a human life will be endangered if the escape is successful.

6. To kill a dangerous animal or one that is so badly injured that humanity requires its removal from further suffering, if it can be done safely (If owner is present, secure permission).

The Seventh Circuit and the District Court considered all the aforementioned facts and circumstances in addition to those set forth in the lower court's opinion and in doing so concluded that the use of deadly force was reasonable and comported with the guidelines established by this Court in *Tennessee v. Garner* and *Graham v. Connor*.

The petition has failed to supply this Court with any reason to undertake another review of the uncontroverted threat of imminent bodily harm or death present in this record.

II.

NEITHER THE DECISION BELOW NOR THE RECORD RAISES THE ISSUES FRAMED BY THE PETITION.

A. THE LOWER COURT CONSIDERED THE TOTALITY OF THE CIRCUMSTANCES.

Petitioner urges that the shooting of Plakas was unreasonable under the totality of the circumstances and that the Seventh Circuit failed to consider the totality of the circumstances leading up to the use of deadly force in determining the constitutionality of the seizure. (Pet. p. 23).

Petitioner misconstrues the opinion of the Seventh Circuit by suggesting that it failed to consider facts and circumstances leading up to the use of deadly force. (Pet. p. 23). The opinion carefully and meticulously reviewed all of the facts and circumstances leading up to the attack on Drinski. (Pet., App. A-2-9).

Additionally, the opinion of the Court noted the importance of the factual details to its decision:

> "The details matter here, so we recite them." (Pet. App. A-2).

The opinion appealed from is clearly the product of the considered and careful judgment of the Court of Appeal's review of all of the facts and record in this case. The following excerpt from the opinion reflects a thorough consideration of all the facts and circumstances leading up to the attack on Drinski:

> "So we carve up the incident into segments and judge each on its own terms to see if the officer was reasonable at each stage. *Tom v. Voida* is a classic example of this analysis. Here it is beyond dispute that, under the Constitution, the police could reasonably (1) arrest Plakas for drunk driving after he exhibited familiar signs of intoxication; (2) track down an escaping arrestee; (3) draw and point weapons after Plakas armed himself and attacked an officer; (4) pursue Plakas into the clearing after he committed a violent offense and was a danger to himself; and (5) try to talk Plakas into disarming himself and surrendering. All of this means Drinski was properly standing in the clearing, gun in hand, several feet away from Plakas, who charged him with the poker raised. It is from

> that point on that we judge the reasonableness of the use of deadly force in light of all the officer knew." (Pet. App. A-14)

The aforementioned excerpt from the opinion appealed from clearly demonstrates that the petitioner is in error in suggesting to this Court that the lower court did not consider the totality of the circumstances leading up to the attack on Drinski. Moreover, the opinion specifically articulated that the Court was considering the whole event as it appeared to the officer involved. (Pet. App. p. A-13).

Plaintiff's assertion that the Seventh Circuit Court of Appeals failed to consider the circumstances before the attack on Drinski is unfounded. The decision below includes a fact specific analysis of all the events leading up to the attack on Drinski. A thorough review of the decision below reveals that the opinion does not support petitioner's contention that the Seventh Circuit failed to consider the totality of the circumstances.

B. ALTERNATIVE MEANS TO EFFECT AN ARREST ARE IRRELEVANT WHEN THE OFFICER REASONABLY USES DEADLY FORCE IN SELF DEFENSE.

The issue framed by petitioner – whether alternative means should be considered in effecting an arrest – is not a question legitimately raised by the opinion and record below. Petitioner overlooks critical evidence in her statement of facts and in her assertion that alternative means should have been used to effect the arrest. (Pet. p. 12). Jeff Drinski was in threat of imminent bodily harm or death

when he fired one shot. Petitioner does not assert otherwise nor does she contest this finding of the District Court or the Seventh Circuit Court of Appeals. Petitioner fails to take this critical fact into account when analyzing the opinion below.

Similarly, petitioner errs in her reliance upon *Klein v. Ryan*, 847 F.2d 368 (7th Cir. 1988) and *Brower v. County of Inyo*, 489 U.S. 593 (1989), appeal after remand, 884 F.2d 1316 (9th Cir.1989). Petitioner cites the aforementioned cases for the proposition that alternative lesser force options must be considered in effecting an arrest. (Pet. p. 13-14). Neither *Brower* nor *Klein* involved a case of self defense by an officer attacked with a deadly weapon.

The opinion below correctly reasoned as follows:

> "This is not a case where an officer claims to have used deadly force to prevent an escape. It is a self-defense case where the officer has "probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer" and, therefore, the officer may use deadly force. *Tennessee v. Garner* 471 U.S. 1, 3 (1985). See also *Graham v. Connor*, 490 U.S. 386, 396 (1989). Indeed, had Drinski been a private citizen, he would have been entitled to claim self-defense under Indiana law (which does not have a rule of retreat)." (Citations omitted). (Pet. App. A-7).

The opinion of the Seventh Circuit does not contravene any opinion of this Court and provides a consistent and well reasoned application of this Court's precedents in *Garner* and *Graham* as applied to the specific facts of this case.

Petitioner also mistakenly asserts that the opinion below is inconsistent with this Court's opinions in *Garner* and *Graham* in its focus on the moment immediately preceeding the shot. (Pet. p. 16). In *Graham*, this Court held reasonableness means the "standard of reasonableness at the moment," and "the calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments in circumstances that are tense, uncertain and rapidly evolving about the amount of force that is necessary in a particular situation." *Graham* 490 U.S. 396. Jeff Drinski was forced to make a split-second judgment in self defense when Plakas charged at him with the weapon. Petitioner's suggestion that this Court should review nonlethal means to effect arrests presents a question not fairly raised by the opinion and record below.

C. THERE IS NO CONFLICT AMONGST THE CIRCUITS REGARDING THE USE OF DEADLY FORCE IN SELF DEFENSE

The contention that police officers created the justification for the use of deadly force is premised upon a misstatement of the evidence asserting that the plaintiff in the district court produced evidence that Officer Koby beat Plakas after Plakas was detained, patted down and handcuffed. This factual assertion is not supported by the record.

FIRST, petitioner waived any assertion of a claim of excessive force by Officer Koby or any other officer of Newton County Sheriff's Department having failed to raise such a claim in the District Court. The plaintiff's

amended complaint did not plead an unconstitutional use of force in the course of the original arrest or thereafter. The amended complaint was limited to a charge of an unconstitutional use of deadly force. Officer Koby was never a party defendant to this case. The Court below considered the possibility of waiver, noting:

> "Perhaps we ought not to consider this theory since it was not plead, but it is of no use to Plakas in any event." (Pet. App. p. A-9).

Having failed to raise this issue in the District Court, the petitioner has waived the opportunity for further review. SECOND, there is no evidence to support petitioner's assertion that Officer Koby beat Plakas. Petitioner asserts that at the time Plakas was taken into custody he was examined by medical personnel who determined he had no injuries to his head and that when he arrived at the Ailes' house after escaping from the locked squad car he had bruises on his head. Petitioner also relies upon Plakas' statement to Officer Koby at the Ailes' home "you hurt me." (Pet. p. 21). Based upon the aforementioned evidence petitioner asserts that Plakas was the victim of police brutality at the hands of Officer Koby. Petitioner fails to mention that the medical personnel wanted to take Plakas to an ambulance so that they could check him over and that he refused treatment after the car accident. (King Dep. p. 8, 12). Additionally, after Koby realized Plakas had opened the squad car door, he hit his brakes and he heard the plaintiff hit the screen between the seats. (Doc. No. 21, Koby p. 6). When Plakas arrived at the Ailes' home, he fell through the open door and did not block the fall with his arms or hands. (Joyce Ailes Dep. p. 23-24). He told Joyce Ailes he wrecked his

car and complained of his head bothering him. (Joyce Ailes Dep. p. 45).

Petitioner cites only a portion of Joyce Ailes' testimony with respect to Plakas yelling at Koby "you hurt me." She testified that Plakas was screaming at Koby because he put him in handcuffs behind the back and it was pulling at his scar tissue. (Joyce Ailes Dep. p. 98). Plakas never complained or reported to anyone at the Ailes' home that any police officer had beaten him or mistreated him. He complained only about the handcuffs. (Joyce Ailes Dep. p. 99, King Dep. p. 56, Ray Ailes Dep. p. 61).

Therefore, there is no evidence to support the plaintiff's assertion that Plakas was the victim of police brutality. THIRD, the lower court did not "avoid the issue" that Plakas was beaten by Newton County Officer Koby as suggested in the petition. (Pet. p. 18) . The Seventh Circuit considered the petitioner's theory and rejected it.

> "Perhaps in recognition of this weakness in the case, Plakas offers two other theories, one of which is a minor theme in his brief that shooting in self defense is in unjustified where the agressor acted out of reasonable fear of police brutality. See *Gilmere v. City of Atlanta*, 774 F.2d 1495, 1501 (11th Circuit 1985) (en banc). Perhaps we ought not to consider this theory since it was not plead, but it is of no use to Plakas in any event.
>
> This theory is founded on the fact that Plakas told Koby, "you hurt me," and on Joyce Ailes' observation that Plakas had facial injuries. From this, Plakas argues a jury could infer that Officer

> Koby had beaten Plakas. This inference, however, cannot reasonably be made. Leaving aside the absence of evidence of facial injuries from medical records or post mortem observation, we accept that Ms. Ailes saw these injuries. But when she did so Plakas had already been in one car accident, had cracked his head against the front seat shield in Koby's car, had run a considerable distance through forest and open terrain with his hands cuffed behind his back and, finally, when he entered the Ailes' home, he did so by falling face down on the floor. Moreover, when Plakas did say anything at all about Koby, it was a complaint about cuffing him behind his back, which he said (without medical corroboration even now) caused pain because of scar tissue. Plakas yelled alot at Koby. It is significant he never yelled about a beating." (Pet. App., A 9-10).

FOURTH, there is no conflict between the lower court opinion and the opinion of *Gilmere v. City of Atlanta*, 774 F.2d 1495 (11th Circuit 1985) as asserted in the petition. (Pet. p. 23).

Gilmere is significantly distinguishable from the instant case. In *Gilmere*, unlike the present case, the officer using deadly force had unjustifiably beat the suspect before shooting him. 774 F.2d 1501, 1502. In *Gilmere*, unlike the instant case, the police had little cause to believe the suspect to be dangerous as he did not have a weapon.

In contrast, in the instant case, respondent Drinski has not been accused of any unjustified beating of Plakas and was not present when Officer Koby took Plakas into

custody. Contrary to the petition's contention, the opinion below is not in conflict with *Gilmere*. Concluding that Drinski did not cause Plakas to attack him, the lower court specifically noted that it was distinguishing *Gilmere*, but by doing so neither approved nor disapproved of its holding. (Pet. App. p. A-10 f.n. 4). It is readily apparent that the opinion of the Seventh Circuit in this case in no way conflicts with the opinion of the Eleventh Circuit in *Gilmere*.

For all the foregoing reasons the decision and record below do not raise the issue as framed in the petition.

III.

THERE IS NO CONSTITUTIONAL REQUIREMENT FOR A POLICE DEPARTMENT TO SUPPLY PARTICULAR EQUIPMENT TO ITS OFFICERS.

Without the support of any precedent, petitioner invites this Court to create and impose a constitutional requirement on police departments mandating the equipment to be provided to its officers.

The Court below correctly declined the invitation, holding:

> "There is, however, not a single precedent which holds that a governmental unit has a constitutional duty to supply particular forms of equipment to police officers. And, in fact, the 5th Circuit has held that the Constitution "does not mandate that law enforcement agencies maintain equipment useful in all foreseeable situations." *Salas v. Carpenter*, 980 F.2d 299, 310 (5th Cir. 1992). Indeed, Plakas merely states this theory, he does not argue it. Nor does he show how

such a rule of liability could be applied with reasonable limits. We do not think it is wise policy to permit every jury in these cases to hear expert testimony that an arrestee would have been uninjured if only the police had been able to use disabling gas or a capture net or a taser (or even larger number of police officers) and then decide a municipality is liable because it failed to buy this equipment (or increase its police force). There can be reasonable debates whether the Constitution also enacts a code of criminal procedure, but we think it is clear that the constitution does not enact a police administrator's equipment list. We decline to use this case to impose constitutional requirements on the police." (Pet. App. p. A-15-16).

The petitioner has provided this Court with no reason to disturb the ruling of the Court below.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

ELIZABETH A. KNIGHT
Counsel of Record
COLLEEN C. COBURN
KNIGHT, HOPPE, FANNING
& KNIGHT, LTD.
2860 River Road, Suite 400
Des Plaines, Illinois 60018-6009
(708) 298-8000

Attorneys for Respondents